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AN ELEMENTARY DIGEST  
OF THE  
LAW OF PROPERTY  
IN LAND

BY THE LATE  
STEPHEN MARTIN LEAKE  
BARRISTER-AT-LAW

SECOND EDITION

BY  
A. E. RANDALL  
BARRISTER-AT-LAW

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## PREFACE

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THIRTY-FIVE years have elapsed since this volume was originally published, and the task of revision has not been a light one. Although I have limited my alterations to matters of substance, I think I may claim that one-third of the present text is original matter.

In the preparation of this edition I have pursued the course which has been followed by a fair measure of success in the case of my editions of the same author's work on Contracts, namely, of attempting to present the same view as would the learned author if he had undertaken the burden. What he attempted to do is best expressed in his own language: "The present work makes no pretence of competing with or improving upon the existing treatises upon the various matters here included by a more complete or more accurate statement or discussion of the matter of law; in this respect it aims merely at giving the law, as it exists, with such accuracy and completeness as is reasonably to be expected in an elementary and compendious work. The reader is referred to the numerous well-approved treatises on the various branches of real property law for further details, and for the discussion of special points of doubt and difficulty. But for the advantageous perusal of those treatises it is for the most part requisite that the reader should be prepared with a clear conception of the subject in general; and the present work may, it is hoped, be found useful in contributing some means towards the attainment of such a conception. . . . As the chief object in view has been to enforce the conclusion that the essential virtue of a digest is to be found in the order of arrangement, it has not been thought worth while to continue or adhere to any strict formality of style."

I have attempted to give a decided case as authority for each proposition. The chief exceptions are, first, where I have failed to find or remember a reported case; secondly, where the

proposition is a deduction from a number of previous decisions, when I have vouched a text-book of recognised authority. The present edition contains a reference to some 2,500 decided cases, and I think I am correct in stating that no case has been retained or inserted unless I have perused the report at large. The references to English text-books are to the last edition, except in the case of Blackstone's Commentaries, where the reference is to the original edition.

A. E. RANDALL.

LINCOLN'S INN,  
*March, 1909.*

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## INTRODUCTION.

Rights distinguished—*jura in rem*—*jura in personam*.  
 Subjects of property distinguished—land and goods.  
 Property in land and goods distinguished—estates in land—various uses of  
   land as subject of property—title and possession.  
 Principles of the civil law of property.  
 English law of property in land—possessory and future estates—difference  
   between the English and the civil law.  
 Distinction of things as real and personal—real and personal property—  
   real and personal actions.  
 Order of treatment—estates in land—land as subject of property—  
   transfer of property in land—law of persons, as affecting property  
   in land.  
 Sources of English law—law of freehold tenure—law of customary tenure  
   —equity—uses—trusts—statute law.  
 Arrangement of the work into Parts.

JURISPRUDENCE distinguishes Rights, using the term in the strict legal meaning, into the two classes of Rights to Things and Rights against Persons, familiarly known in the civil law by the terms *jura in rem* and *jura in personam* (a). Rights distinguished as *jura in rem* and *jura in personam*.

Rights to things, *jura in rem*, have for their subject some material thing, as land or goods, which the owner may use or dispose of in any manner he pleases within the limits prescribed by the terms of his right. A right of this kind imports in all persons generally the correlative negative duty of abstaining from any interference with the exercise of it by the owner; and by enforcing this duty the law protects and establishes the right. But a right of this kind does not import any positive duty in any determinate person, or require any act or intervention of such person for its exercise and enjoyment (b). *Jura in rem.*

(a) "The distinction between rights—is that all-pervading and important distinction which has been assumed by the Roman Institutional writers as the main groundwork of their arrangement; namely, the distinction between rights *in rem* and rights *in personam*; or rights which avail against persons generally or universally, and rights which avail exclusively against certain or determinate persons. The terms '*jus*

*in rem*' and '*jus in personam*' were devised by the civilians of the middle ages, or arose in times still more recent. I adopt them without hesitation—for of all the numerous terms by which the distinction is expressed, they denote it the most adequately and the least ambiguously." 1 Austin Jur., Lect. xiv. Compare 1 Ortolan Inst. Part 2, tit. 2, Des Droits, p. 636, 11th ed.

(b) 1 Austin Jur., Lect. xiv.

*Jura in personam.*

Rights against persons, *jura in personam*, on the other hand, have for their subject an act or performance of some certain determinate person, as the payment of money, the delivery of goods and the like. A right of this kind imports the correlative positive legal duty in the determinate person to act in the manner prescribed. It depends for its exercise or enjoyment upon the performance of that duty, and is secured by the legal remedies provided for a breach of performance. This class of rights includes the rights arising from contracts and all transactions of the nature of contract, which form the branch of law known as the Law of Contracts (c). The present work treats of the former class of *jura in rem*, and of only one subject of that class.

The subjects of property distinguished.

Rights to things, *Jura in rem*, vary and are distinguished according to the things or material subjects in the use or disposal of which the right consists.

Things, as subjects of property, may be referred to two principal kinds, distinguished by qualities inherent in their nature.

Land.

The one kind, which may be designated by the general term *Land*, is characterised by the abstract physical qualities:—that the subject is immoveable and indestructible; that the use and enjoyment of it is perpetual and uniformly continuous.

Goods.

The other kind, which may be designated by the general term *Goods*, is characterised by the qualities:—that they are moveable and perishable; that the use and enjoyment of them is not perpetual or uniform, but is transitory and exhaustible. They are, in various degrees, consumed or destroyed in using,—*quæ in ipso usu consumuntur*.

These two classes are designated in the Roman civil law after their most characteristic quality, by the terms “moveable” and “immoveable,”—*res mobiles* and *res immobiles* or *quæ soli sunt* (d).

Property in land and goods distinguished.  
Estates in land.

The distinctions of quality in the subjects of property form the ground of important differences in the law.

By reason of the perpetuity and uniform continuity of the use of *Land* the future use may be considered separately from the present possession, and may be limited or measured out by intervals of time and treated in distinct property or properties. It is true, the use and possession of land *in specie* cannot be

(c) Austin, *supra*. See Leake on Des Choses, p. 595; Code Civil, liv. ii. tit. 1.

(d) See 1 Ortolan Inst. Part 1, tit. 2,

anticipated; it flows on uniformly and concurrently with the progress of time by which the property is measured out; but though the possession be deferred, the future use or property is capable of presently defined ownership, with a present power of sale or exchange whereby it may be made available for present purposes. The total or indefinite extension, as to duration, of property in land may thus be portioned out by means of successive intervals of use into separate properties, measured by terms of years, or by lives, or other specified times or events of certain or uncertain occurrence. In this manner are produced the various *Estates* in land which are familiar, at least, to English Jurisprudence (*e*).

But *Goods*, as a class, by reason of their transitory and perishable nature are incapable, except in a slight degree, of this mode of treatment, and the property in such subjects is, in general, simple and absolute.

Absolute property in goods.

There are, however, included in this class of things subjects of various degrees of permanency, which may, therefore, in corresponding degrees be assimilated to land in legal treatment. Accordingly, the general legal doctrine that the property in goods must be simple and absolute is largely qualified by various concurrent legal doctrines and principles; such, for instance, as the law of bailment, or the delivery of the possession of goods under contracts for special and limited purposes. Also English Courts of Equity by means of the doctrine of trusts create temporary and substitutional interests in property of this kind; and by the peculiar equitable doctrine of conversion it may be impressed, for many purposes, with the quality of permanence, and may be distributed in as many and complicated estates and limitations as land itself.

Land, again, is a complex subject, subservient to a great variety of beneficial uses, some derived from the surface, some from the regions above and below the surface, some from the various productions of the land, animal, vegetable, and mineral;—and some of the uses and profits of land are so far independent and separable from the rest that they may be appropriated as distinct subjects of property. Such are the rights of taking minerals, rights of common, rights of way, and numerous other rights of using land for profit, or for mere convenience. Whence arises an extensive branch of law concerning the various uses and profits of land and their separate appropriation.

The various uses of land, as subject of property.

(*e*) See arg. *Walsingham's Case*, Plowden, 547, at p. 555; Bacon's Tracts, p. 337.

On the other hand, the kind of property designated by the term goods, while it comprises many species of things each subservient to a distinct purpose, does not admit, as to specific things, of a like division into separate uses and property; and there is no corresponding branch of law relating thereto.

Title and  
possession  
of land.

Again, by reason of the fixity and permanency of land the difficulty of ascertaining and identifying any portion is inconsiderable, and the title is conveniently referred to records and documentary evidence. Property in land, with few exceptions, is transferred only by written instruments; while all future estates and interests, which form so large a proportion of that class of property, being incapable of possession, rest entirely upon documentary title. Possession of land, if wrongfully taken, can always be restored; mere possession is presumptive evidence of right, but this presumption may itself be rebutted by other presumptive evidence, and is of no efficacy whatever against proof of a rightful title; nor is prolonged possession of any avail except by the operation of time in extinguishing adverse claims (*f*).

Title and  
possession  
of goods.

On the other hand, by reason of the moveable and fluctuating nature of goods and the consequent difficulty of tracing and identifying them, and by reason also of the use lying for the most part in consumption, possession is, in general, taken as sufficient proof of property, and the mere transfer of possession as a sufficient act of conveyance. Possession, if wrongfully taken, can seldom be restored, and it generally happens that the only practicable restitution is by compensation in value.

Principles of  
the civil law  
of property.

In the Roman civil law and the systems founded upon it, as the French "Code Civil," the capacity of land to be appropriated in possessory and future interests is not directly recognised. Property in land and in goods is reduced to one and the same system of rules, subject only to necessary modifications in detail. Property, strictly so called, whether in land or in goods, things immoveable or moveable, is entire, indivisible, and absolute. Rights of temporary possession, so far as they are recognised, are not considered as infringing upon the integrity of property, but are ranged, together with rights to

(*f*) *Jayne v. Price*, 5 Taunt. 326; *Emmerson v. Maddison*, [1906] A. C. 569; 75 L. J. P. C. 109; *Perry v. Asher v. Whitlock*, L. R. 1 Q. B. 1; *Vane v. Vane*, L. R. 8 Ch. 383; 42 Clissold, [1907] A. C. 73; 76 L. J. P. C. 19.  
L. J. Ch. 302; *Rosenberg v. Cook*, 8 Q. B. D. 162; 51 L. J. Q. B. 170;

detached uses and profits, in a separate class under the denomination of *jura in re alienâ* or simply *jura in re* and opposed to *dominium* or *jus in re propriâ*. A corresponding distinction is marked in the terms *corporis dominus* and *is qui jus habet*, the former having *possession* and the latter merely a *quasi possession*;—also in the classification of things as *res corporales* and *res incorporales, quæ in jure consistunt* (g).

*Dominium*  
and *jura in re*.

The full recognition of possessory and future property in land may be said to constitute the characteristic feature of the English system. It is made a leading distinction by Blackstone that “estates, with regard to the time of their enjoyment, may either be in possession or in expectancy” (h); and upon this capacity of sustaining future estates depends all the intricacy of limitations occurring in the settlement and distribution of land.

English law  
of property  
in land.

Possessory  
and future  
estates.

The cause of this difference between the Roman and English systems seems to lie in the derivation of the latter from the Feudal system; under which the originally precarious interest of the tenant became gradually established as a fixed estate or property in the land as against the lord, whose property was thereby converted into a reversionary or future estate. The principle of division of estates thus instituted was subsequently worked out by conveyancers and sanctioned by the courts to the full capacity of the subject for such mode of treatment, and in subservience, it must be presumed, to the exigencies of the public. The Legislature interfered but seldom with this process of development; and even its occasional interference has operated in most cases in aid of the principle by facilitating the creation and disposition of future estates, and by liberating future estates and interests from their ancient dependance upon the present seisin or possession (i).

Difference  
between  
Roman and  
English  
systems.

On the other hand, the English law of property in goods, conforming to the different nature of the subject, does not admit

No future  
property  
in goods.

(g) 2 Austin, 876, 965; Savigny on Possession, b. 1, § ix. xii., in Perry's Transl. 76, 131; 1 Ortolan Inst. 636 *et seq.*, 11th ed.; Code Civil, liv. ii. tit. ii., De la Propriété, tit. iii., De l'Usufruit, etc. In the French code substitutions of ownership are absolutely prohibited, Art. 896; with an exception in favour of children, Art. 1048; and, where no children, in favour of brothers and sisters, Art. 1049.

(h) 2 Blackst. Com. 163, 1st ed.

(i) “While in this country, and in

every other country whose jurisprudence is of a feudal extraction, the difference between real and personal, or immoveable and moveable property is so strongly marked, and the legal qualities and incidents of the two species of property, are in so many important consequences, utterly dissimilar, the distinction between them in the civil law, except in the term of prescription, is seldom discoverable.” Butler's note to Co. Lit. 191 a, 11. 2; and see Ib. V. 3; Butler's note to Fearn, C. R. 567.

the same mode of limitation. According to Blackstone :—" By the rules of the antient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were generally tolerated and allowed" (*k*).

Thus it appears that in the English law property in land and property in goods are regulated upon different systems, and require to be treated as separate branches of law.

Things real  
and personal.

According to English law the subjects of property are divided into *Things real* and *Things personal*. The class of *Things real* comprises land, and all the separate uses, profits and interests in land which are capable of being treated as separate subjects of property. The class of *Things personal* comprises goods and all things moveable. The terms *Real property* and *Personal property* follow for the most part this division of things the subjects of property (*l*). An estate for a term of years, owing to an historical accident, is for many purposes regarded as personal property, and is accordingly known as a chattel real, or a chattel interest in land; but where questions of international law arise, it is classed among immoveables, and the *lex loci rei sitae* furnishes the governing rule relative to its transfer and devolution (*m*). There is also an anomalous property created by grants from the Crown of annuities payable to the grantee and his heirs, which descend to the heir, but are yet personal property and may be disposed of as such (*n*).

Real and  
personal  
property.

Distinction  
derived from  
real and  
personal  
actions.

The terms real and personal were originally applied, following the civil law, to actions, which were distinguished as *real* and *personal*, *in rem* and *in personam*: the former, claiming to recover the thing *in specie*, were appropriate to land, which, as being immoveable and indestructible, was always at hand to answer the claim; the latter, claiming to recover compensation or damages, applied to injuries to the person and property, including moveable things as not being adaptable to recovery *in*

(*k*) 2 Blackst. Com. 398.

(*l*) 2 Blackst. Com. 16, 384, 389, 397; 3 Ib. 117, 144. But the term personal property includes certain interests in land known as chattels real, to be explained hereafter, and it further includes all rights arising out of contracts and rights of action.

(*m*) *Freke v. Carbery* (Lord), L. R. 16 Eq. 461; *Duncan v. Lawson*, 41 Ch. D. 394; 58 L. J. Ch. 502; *Pepin v. Bruyère*, [1902] 1 Ch. 24; 71 L. J. C. 39; *Re Grassi*, [1905] 1 Ch. 514; 74 L. J. Ch. 341.

(*n*) *Aubin v. Daly*, 4 B. & Ald. 59; *Radburn v. Jervis*, 3 Beav. 450.

*specie*. Hence the terms real and personal were afterwards transferred to the subjects of property, to the deprivation of which such actions were appropriate, and they were so used in the time of Coke (*o*).

The abstract considerations above noticed respecting property in land may serve as a guide to the distribution of the subject or order of treatment.

For the purpose of investigating the various estates and interests which may be had in land, that quality of the subject only need be considered upon which the limitation of estates is based, namely, perpetuity and uniformity of use. Property in a subject of the standard quality here assumed admits of variation only in two respects, namely, in the quantity or duration of the possession, and in the time when the possession is to begin. And accordingly this Part of the work will treat of the rules of law regulating the limitation of estates, and will be conveniently divided into two Chapters treating respectively of the limitation of estates as to quantity or duration, and of the limitation of future estates.

But there occurs at the outset a peculiar difficulty in the way of systematic treatment of any kind, in the circumstance that the sources of the law are not homogeneous. There is no single source or standard of authority to which the law on all points is to be referred, and which can be tacitly assumed on all occasions, as the basis of statement and argument. There exist concurrently several systems, sprung from distinct historical sources, and developed independently through distinct lines of progress; framed on different technical principles and producing different and in many points contradictory sets of rules; but which combinedly constitute the English law of real property. These have to be compared and duly subordinated in operation in order to discover the resultant regulative effect.

The various sources here referred to may be summarily enumerated as follows:—

The law of *Freehold tenure*, being the common law of the realm, generally applicable to all land therein (*p*).

The law of *Customary tenure* applicable to particular lands only, which are commonly known as lands of customary or

(*o*) Bracton, 7 *b*; 101 *b*–102 *b*. According to Coke, "goods or chattels are either personal or real. Personal, as beasts, household stuff, and such like, called personal, because for the most part they belong to the person of a man, or else for that they are to be recovered by personal actions. Real, because they concern the realty, as terms for years of lands or tenements, and such like." Co. Lit. 118 *b*; see 1*b*. 1 *b*, 6 *a*.  
(*p*) See *post*, p. 11.

copyhold tenure. This law, where it exists, is concurrent with the former, being engrafted upon it by local custom. It is composed in part of general customs applicable to all such lands, and partly of special customs prevailing only in particular places (*q*).

**Equity.** Concurrently with the above, property in land has from an early date been regulated by the system of *Equity*, as administered in the Court of Chancery and its branches; which court, while recognising the rules of freehold and customary tenure, exercised a jurisdiction to control and modify their effect, by compelling the legal owner to deal with the land at law according to the rules and principles of equity.

**Uses.** The system of equity, in its application to land, may again be divided into two periods:—The system of *Uses* or equitable property before the passing of the Statute of Uses. Uses by that statute were converted into legal estates; and the doctrines of uses, after the passing of the statute, became matter of legal cognisance and jurisdiction.—And the system of *Trusts* or modern equitable property in land, which remained within the exclusive jurisdiction of the Courts of Equity (*r*).

**Statute law.** In addition to the above systems or sources of law there is to be noticed a large body of *Statute law* by which they have been, sometimes collectively, sometimes separately, from time to time, modified and amended. These statutes may, for the most part, be considered and treated as constitutive parts of the systems to which they respectively relate.

In attempting to construct a systematic body of law out of these apparently discordant materials the problem presented is to obtain the compound results of the various sources in the form of positive rules, and to state and arrange them in an uniform style and method. But the rules of law are found so deeply rooted in their peculiar sources and so dependent upon those sources for their relative efficacy that it is impossible

(*q*) See *post*, p. 51.

(*r*) "It is necessary to take notice of the different interests in land at this day. There are three kinds: first, the estate in the land itself, the ancient common law fee. Secondly, the use; which was originally a creature of equity, but since the statute of uses, it draws the estate in land to it; so that

they are joined and make one legal estate. Thirdly, the trust; which the common law takes no notice of, but which carries the beneficial interest and profits in this court, and is still a creature of equity, as the use was before the statute." *Willet v. Sandford*, 1 Ves. sen. 186, per Hardwicke, L. C. See *post*, p. 101.



entirely to sever the connection or to leave the sources wholly out of consideration. It is impossible, for instance, to give an intelligible exposition of freehold property in land, as it exists, without referring at some length to the principles of feudal tenure and the leading statutes and events which have brought it to its present form. Estates in fee simple and entails can only be understood by referring to their gradual development. It would be useless to mention the name of copyhold or anything concerning it, without entering upon its origin and derivation in history. Laws founded on custom can only be explained by reference to the origin and growth of the custom.

So, likewise, with the distinctive sources and nature of Law and Equity, the changes effected by the Statute of Uses, and many other matters of the like kind. The matters essentially require some extended explanation, and do not admit of a mere statement of results in the form of positive law.

This difficulty, in dealing with what may be described as the historical element, may, it is conceived, be best met by devoting a separate Part of the work to a concise account of the various Sources of the law, sufficient to explain their distinctive origin and character, and their present scope and operation.

## PART I.



### THE SOURCES OF THE LAW.

CHAPTER I. The law of Freehold tenure, as subsisting at common law.

II. The law of Customary tenure.

III. The law of Uses, as incorporated in the common law by the Statute of Uses.

IV. The law of Trusts and equitable property in land.

The Sources of the law of property in land will be treated in this Part in the above order according to the arrangement proposed in the Introduction.

## CHAPTER I.

## THE LAW OF FREEHOLD TENURE.

Section I. Tenure.

II. Estates of freehold tenure.

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## SECTION I. TENURE.

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Statute 12 Car. II., abolishing feudal incidents and converting tenures  
into common socage.

THE law of freehold tenure is derived from the feudal system ;  
it still retains much of its original feudal form, and is expressed  
in terms and phrases which can be interpreted rightly only by  
reference to their feudal origin.

The feudal system of property in land, as established in Tenure.  
England, was based on the theory that all land held by a subject  
was derived originally by grant from the crown, as sovereign  
lord or owner ;—that land could not be held by a subject in  
absolute independent ownership, for such was the exclusive  
prerogative of the crown ;—but that all land was held under  
obligation of duties and services, imposed either by force of law  
or by express terms of the grant ; whereby a relation was con-  
stituted and permanently maintained between the tenant and  
the crown called the *tenure* of the land, characterised by the  
quality of the duties and services upon which the land was held.

In like manner the tenants of the crown might grant out parts Sub-tenure.  
of their land to sub-tenants upon similar terms of rendering  
services, thereby creating a sub-tenure or relation of tenure

between themselves, as *mesne* or intermediate lords and their grantees as tenants; but without affecting the ultimate tenure under the crown as lord *paramount* (a). A tenure without the interposition of any *mesne* lord was called a tenure *in capite* or tenure in chief (b). It does not appear to have been decided that in the absence of proof of *mesne* tenure, it will be presumed that the land is held immediately under the crown, and the existence of this presumption has been judicially doubted (c). If it ever becomes necessary to decide the question, the "incontrovertible rule of law that where the King's and the subject's title concur, the King's shall be preferred" (d), would apparently throw the burden upon the party claiming to be *mesne* tenant of proving a title superior to that of the crown. It is clear, however, that so far back as the reign of Edward III., the crown in some cases made grants of lands escheated after an inquest *post mortem* (e), and after office found, if the lands were forfeited upon an attainder (f).

Infeudation.

The estate of the tenant in the land was called a feud, fief, or *fee*;—the *infeudation* or grant was effected by the ceremony of *feoffment* or delivery of the land by the lord to the tenant to be held by him upon the terms then expressed or implied;—and the tenant was thereby *invested* with the *seisin* or actual possession of the land (g).

Statute *quia emptores* abolishing sub-infeudation.

The power of sub-infeudation, by which sub-tenures were created, was taken away by the statute *Quia emptores*, 18 Ed. I., c. 1, which enacted "that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them; so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee by such service and customs as his feoffor held before." Since this statute no tenant can alien or grant his fee to be held of himself. The statute admitted the right of the tenant to dispose of the fee, but upon a feoffment being made, the land was to be held by the feoffee of the next superior lord of whom the feoffor held before, and by the same services (h).

(a) Co. Lit. 65 a; Hargrave's note (1) 1b.; Co. Lit. 1 a, 92 b; Butler's note to Co. Lit. 191 a, V. "This universality of tenure is peculiar to England." 1b. VI.; Hallam, Middle Ages, p. 164, 6th ed.

(b) Co. Lit. 108 a; Hargrave's note (3) 1b.

(c) *Doe v. Redfern*, 12 East, 96.

(d) See *Rex v. Cotton*, Parker, 112;

*Giles v. Grover*, 1 Cl. & F. 72; *New S. Wales (Taxation Commrs.) v. Palmer*, [1907] A. C. 179; 76 L. J. P. C. 41.

(e) *Gouge v. Woodwin*, Robinson, Gavelkind, 44, 5th ed.

(f) *Sir John Molyn's Case*, 6 Co. 5 b.

(g) Co. Lit. 1 b, 9 a.

(h) Co. Lit. 98 b, 143 b; *Bradshaw v. Lawson*, 4 T. R. 442.

Before the statute the tenant, though he might by sub-infeudation have created a new tenure of himself as lord, could not transfer or get rid of his own tenure, with its attendant duties and services, without the licence of the lord. The statute, while disabling him from sub-infeudation, enabled him freely and without licence to alien his own tenure (*i*).

The statute extends only to the sale or alienation of the entire fee or estate in the land (*k*). By aliening the land for a partial or less estate, reserving the ulterior estate in the fee, a species of sub-tenure or imperfect tenure might still be created (*l*).

A grant of land from the crown under the feudal system usually conferred rights of jurisdiction and other sovereign rights or franchises within the territory, by virtue of which it was constituted a *manor*. The larger manors, comprising inferior manors and lordships held of them by sub-infeudation, were, in early times, often called, with some slight distinctions of meaning, *honours* and *baronies*. Manors.

In regard to territory, a manor comprised the portions of the fee retained in possession by the lord himself, called the *demesne* lands, *terræ dominicales*, and the portions granted in fee to tenants by sub-infeudation to hold of the manor by services, *terræ tenementales*, of which the lord retained the seignory and services. There might also be *waste* land, not as yet in occupation, used in common by the tenants of the manor for pasturage and like purposes; but the title remained in the lord, who might from time to time *approve* or appropriate the waste, subject to the rights exercised over it by his tenants. Demesne lands and services.  
  
Waste land.

In regard to jurisdiction, the manor comprised a court called the Court Baron or Lord's Court, having two distinct branches or courts. The superior or freehold branch of the court was constituted of the tenants holding fees of the manor, who were bound by their tenure to give *suit* or service at the court, as judges; and their jurisdiction extended to pleas concerning the lands thus held of the manor. Court Baron.

The aggregate of these rights and incidents constituted a manor in the legal acceptance of the term; and, accordingly, a manor is described in law as consisting of demesne lands, and seignories and services anciently united thereto, together

(*i*) *Merttens v. Hill*, [1901] 1 Ch. 842; cited.  
70 L. J. C. 489. See Co. Lit. 43 *a*; (*k*) 18 Ed. I. c. 1, s. 3.  
Hargrave's note (2) *Ib.*, & auth. there (*l*) See *post*, p. 29.

with the jurisdiction of a court baron; all of which elements are necessary to constitute a perfect manor (*m*).

Creation of manors.

After the statute *Quia emptores* no new manor could be created. The grant of a fee no longer created a seignory and tenure, for the grantee held of the superior lord and not of the grantor. The lord, therefore, could not create freehold tenants to hold a court baron, which is an essential element in the constitution of a manor. Moreover, manors are sanctioned only by prescription or ancient custom; hence the king himself, though he can create a new tenure, cannot create a perfect manor at the present day without statutory confirmation (*n*).

Extinction of manors.

A manor may become extinguished, as a perfect manor, by the severance of the demesne lands from the seignory and services of the lands in tenure; as, if the lord transfer to some stranger the services of all his tenants, and reserve unto himself the demesnes; or, if he grant away the demesnes and reserve the services. A manor may also be extinguished by the extinction of the services; as if the lord purchase all the land of the freeholders, or release unto his freeholders all their services (*o*).

By severance of the demesnes and services.

By extinction of the services.

By failure of the Court Baron.

A manor might also be extinguished by failure of the court baron. Two freeholders of the manor, at least, were necessary to hold the court baron; consequently, if this number of tenants failed, the court could no longer be constituted, and the manor, without a court baron, ceased legally to exist (*p*).

Reputed manors.

But in all the above cases of extinction, though the manor no longer exists in its legal integrity, it may continue as a manor *by repute, nomine tantum*; and it may still be attended with such of the rights and incidents of the original manor as may remain unaffected by the legal extinction (*q*).

(*m*) Perkins, s. 670; Co. Lit. 58 *a*, *b*; Co. Cop. s. 31; Elton, Cop. pp. 9 *et seq.* Spelman Gloss. "Manerium." As to the distinction of the demesne lands and the lands in tenure, see Co. Lit. 17 *a*; *Att.-Gen. v. Parsons*, 2 Cr. & J. 279, and the authorities cited in the judgment. As to the right of the tenants over the waste and of the lord to approve the waste, with and without the consent of the tenants, see *Betts v. Thompson*, L. R. 6 Ch. 732; *Warwick v. Queen's Coll., Oxford*, L. R. 6 Ch. 716; *Ransey v. Craddas*, 62 L. J. Q. B. 269; [1893] 1 Q. B. 228. On the origin of manors, Maitland, "Domesday Book and Beyond," and Vinogradoff, "Growth of the Manor," may be usefully consulted. As to the respective rights of lord and tenant upon allotment of wastes under an enclosure act: see *Devonshire (Duke) v. O'Connor*, 24 Q. B. D. 468; *Eccroyd v.*

*Coulthard*, [1898] 2 Ch. 358.

(*n*) Co. Cop. s. 31; *Bradshaw v. Lawson*, 4 T. R. 443; *Delacherois v. Delacherois*, 11 H. L. C. 62.

(*o*) *Sir Moyle Finch's Case*, 6 Co. 63 *a*; *Delacherois v. Delacherois*, *supra*; *Revell v. Jodrell*, 2 T. R. 415.

(*p*) Co. Lit. 58 *a*; Co. Cop. s. 31; see *Chetwood v. Crew*, Willes, 614; *Bradshaw v. Lawson*, 4 T. R. 443. The jurisdiction of the Court Baron in writs of right concerning lands within the manor was expressly abolished by 3 & 4 Will. IV. c. 27, s. 36, and in all other matters the court has been either superseded or fallen into disuse. See a provision for the surrender of manorial courts in which debts or demands may be recovered. The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 5.

(*q*) *Sauve v. Ireland*, 10 East, 259; *Steel v. Prickett*, 2 Stark. 463. As to

It may here be mentioned that besides the freehold tenants holding fees of the manor, there is, in many manors, a class of tenants occupying parts of the demesne lands without acquiring fees or freehold estates. They are not necessary to the existence of a manor, and hold under a distinct tenure known as customary or copyhold tenure, which forms the subject of the next Chapter of this part. Corresponding to which is the customary branch of the Court Baron having jurisdiction over these customary tenancies of the demesne lands. In this branch of the court, the lord or his steward is the judge; and it may still be held though the freehold branch of the Court Baron may have become extinct (r).

Customary or copyhold tenants.

Customary Court Baron.

Another distinct Court frequently existed as a franchise of a manor called the *Court Leet*, exercising a general criminal and administrative jurisdiction within the manor. This court was not a necessary incident of a manor, but appertained to the lord only by special prescription or special grant of the franchise from the crown; its jurisdiction has been wholly superseded by other courts and officers (s).

Court Leet.

Tenures were distinguished by the character of the services. The chief distinction of services was between those of a military or protective character, and those of an agricultural or profitable character; on which was founded the corresponding distinction of tenures into knight service, *servitium militare*, and socage, *socagium* (t).

Services of tenure.

Tenure by knight service originally bound the tenant to attend the king or next superior lord in war. Tenure in chief of the king was, for the most part, of this kind; if the king granted land in fee without reserving any service, or even by the express words *absque aliquo inde reddendo*, it constituted in law a tenure by knight service (u).

Knight service.

Knight service, depending upon war, was necessarily uncertain as to occasion, and, therefore, as to quantity; but upon each occasion of war the lord could only claim attendance for a fixed time. The obvious inconvenience of which system led to a commutation of the personal service of the tenant for a payment in money, called *escuage* or *scutage*; whence arose tenure by escuage as a species of knight service (x). Escuage might be

Escuage.

the right to manorial wastes, see Watkin's Cop. by Coventry, p. 48.

See *Rex v. Dickenson*, Wms. Saund. 152; Kitchen on Courts.

(r) Co. Lit. 58 a; *Delacherois v. Delacherois*, 11 H. L. C. 62; *post*, p. 54.

(t) Co. Lit. 74 b, *et seq.*, 85 b, *et seq.*  
(u) *Wheeler's Case*, 6 Co. 6 b; *Loice's Case*, 9 Co. 122 b.

(s) Co. Cop. s. 31; 4 Inst. c. 54.

(x) Co. Lit. 68 b, *et seq.*

fixed at a certain sum by the terms of the grant; where the escuage was uncertain the parliament acquired the power of assessing it for the occasion (*y*).

Special forms  
of knight  
service,—  
grand ser-  
jeanty.

There were varieties of knight service distinguished by special services:—the chief of these was *Grand serjeanty* in which the tenant was bound to some special service in person to the king, as to carry his banner, or his lance, or to lead his army, or the like, or to do some service of honour at his coronation, or to hold some office of his exchequer (*z*). A man could not hold by *Grand serjeanty* but of the king (*a*).

Castle guard.

Tenure by *Castle guard* was by the service of keeping a castle or part of a castle of the lord, instead of the ordinary military service or escuage (*b*). Tenure by *Cornage* bound the tenant to wind a horn to signal the approach of an enemy, a tenure prevalent in ancient times in the marches of Scotland (*c*).

Cornage.

Socage tenure.

The services of socage tenure were originally of an agricultural or profitable kind to be rendered on the demesne lands of the lord in manner and quantity specified in the grant; but the chief characteristic of socage tenure, as distinguished from tenure by military services, was that they were certain and fixed; so that all tenures of land by certain and invariable rents and services, though not agricultural, came to be regarded as socage in effect (*d*). "Some tenures in socage are named *a causâ* and some and the greater part *ab effectu*—as having the like effects and incidents as socage hath" (*e*). Thus where escuage was fixed by the grant at a certain sum, the tenure was deemed to be *in effect* the same with socage tenure, by reason of the certainty of the service (*f*).

Rent service.

Mutual convenience led in course of time to a commutation of agricultural services into money payments of fixed amount, retaining the ancient remedies for their punctual observance. They thus became rents or *rent service* attended with the common law remedy of *distress* (*g*). Hence a division of socage tenure sometimes made into *free* socage, where the services were commuted into money rent;—and *villein* socage, where the services

(*y*) Co. Lit. 72 *a*, *b*, 87 *a*.

(*z*) Co. Lit. 105 *b*; see Blount's Ancient Tenures, by Beckwith.

(*a*) Co. Litt. 108 *b*.

(*b*) Co. Lit. 82 *b*, 83 *a*, 87 *a*; as to tenure by rent for castle guard, see *Capell v. Aprice*, F. Moo. I, stated 4 Co. 88 *a*.

(*c*) Co. Lit. 106 *b*. See *Pusey v. Pusey*, 1 Vern. 273, where the horn, used as the symbol of tenure, like title

deeds, was held to pass with the estate as an heirloom. Tenure of the king by cornage was a species of grand serjeanty: Co. Lit. 107 *a*.

(*d*) Co. Lit. 85 *b*, *et seq.*; see *Wheeler's Case*, 6 Co. 6 *b*.

(*e*) Co. Lit. 86 *a*.

(*f*) Co. Lit. 87 *a*.

(*g*) Co. Lit. 86, *a*, *b*; 87 *a*, *b*; see Bullen on Distress, p. 23.



were to be rendered in kind, as ploughing land, carrying dung, plashing hedges and the like (*h*).

Other forms of tenure were classed under the general term socage, by reason of their certain services and similar general incidents;—as *Petit serjeanty* and *Burgage tenure*:—And some socage tenures had local peculiarities, as *Gavelkind*, and *Ancient demesne*. Special forms of socage tenure.

*Petit serjeanty* was a tenure of the king in chief to yield to him yearly a bow, or a sword, or a lance, or arrows or such other things belonging to war, like a rent, but not to do anything in person; such service was therefore socage in effect, and subject only to the incidents of that tenure (*i*). A man could not hold by *petit serjeanty* but of the king (*k*). Petit serjeanty.

Tenure in *burgage* is the tenure in ancient boroughs (*l*) in respect of tenements held of the king or other lord by a certain annual rent. It is socage in effect, though generally subject to local customs (*m*). Burgage.

*Gavelkind* is the socage tenure existing in the county of Kent, having some peculiar incidents, of which the most important consists in the partition of the land on descent. All lands in that county are presumed to be of *Gavelkind* tenure, until the contrary be proved; whence it has been called the common law of Kent (*n*). Gavelkind.

*Ancient demesne* (*antiquum dominium regis*) consists of those manors which, though now perhaps granted out to subjects, were anciently in the property of the crown, and so appear to have been by the record of Domesday Book. In such manors, the Court Baron of the manor had exclusive jurisdiction in all suits concerning lands of the manor held in socage, so that a suit respecting such lands brought in the superior courts might be met by a plea to the jurisdiction; but this rule did not extend to copyholds, because the lord or his steward was judge in the manorial court (*o*). The freehold of land held in socage of a manor of ancient demesne is in the tenant, and not in the lord (*p*). Ancient demesne.

(*h*) Co. Cop. s. 18; see *post*, p. 58.

(*i*) Co. Lit. 108 *a*, *b*; see *Wheeler's Case*, 6 Co. 6 *b*.

(*k*) Co. Lit. 108 *b*.

(*l*) See *May v. Street*, Cro. El. 120.

(*m*) Co. Lit. 108 *b*, *et seq.*; see *Busher v. Thompson*, 4 C. B. 48; *Beckett v. Leeds (Corp.)*, L. R. 7 Ch. 421.

(*n*) Co. Lit. 175 *b*; Robinson on *Gavelkind*, p. 44. See *Doe v. Llandaff (Bp.)* 2 Bos. & P. N. R. 491.

(*o*) *Alden's Case*, 5 Co. 105 *a*; *Hunt*

*v. Burn*, 1 Salk. 57; *Brittle v. Dade*, 1 Salk. 185. The issue whether a manor is ancient demesne or not is tried by the record of Domesday Book; *Doe v. Roe*, 2 Burr. 1046; *Doe v. Roe*, 10 East, 523; see *post*, Part I. Ch. II., "Customary Tenure." And see 3 & 4 W. IV. c. 74, ss. 4-6, Carson, Real Property Statutes, 468.

(*p*) *Mertens v. Hill*, [1901] 1 Ch. 842; 70 L. J. Ch. 489.

Frankalmoign.

Frankalmoign (*in liberam eleemosinam*) is the tenure by which all ecclesiastical persons, as bishops, deans and chapters, archdeacons, prebends, parsons, vicars and the like, being incorporate bodies aggregate or sole, hold lands to them and their successors; they are bound to divine services, for which, however, they are answerable only to their ecclesiastical superiors, and they owe no fealty or temporal service (*q*). If the tenure were by a *certain* divine service, as to sing a mass on appointed days, to find a chaplain or to distribute alms to the poor, the lord might distrain as for other services certain; but such a tenure is not frankalmoign, for in that tenure no mention is made of the manner or certainty of the service (*r*).

Occasional incidents of tenure.

Besides the above regular services of tenure prescribed by the grant according to the requirements of the lord, other occasional rights and profits accrued to the lord as incidents of the tenure, for the most part by rule of law without special reservation; some being incident to tenure generally, and some to particular tenures only. Of these the following may be mentioned as the most important.

Homage.

Homage and fealty, or fealty at least, were due to the lord by his tenant(s). Homage, which included fealty, was an essential incident of knight service and presumptively indicated that tenure, though it might be incident also to socage tenure (*t*).

Fealty.

Fealty was the universal incident of every tenure except tenure by frankalmoign, which owed no temporal service. Whatever services were expressed, fealty was implied; and though no services were expressed, fealty, at least, was due to preserve the tenure. To hold by fealty only was socage tenure. Homage disappeared with knight service; and the formal observance of fealty has long ago become obsolete (*u*).

Wardship.

Wardship entitled the lord, upon the death of a tenant in knight service leaving an infant heir, to have the land until his age of 21 years, subject only to the charge of maintaining and educating him; because such heir by intendment of the law was not able to do knight service before that age (*x*). There was no wardship in socage tenure, because the heir might perform the services by his guardian; and for this purpose

(*q*) Co. Lit. 93 *b*, *et seq.*

(*r*) Co. Lit. 96 *b*.

(*s*) Co. Lit. 65 *a*, *et seq.*

(*t*) Co. Lit. 67 *b*, 68 *a*, 86 *b*, *et seq.*

(*u*) Co. Lit. 92 *b*, 93 *a*, *b*; 95 *a*, *b*;

*Wheeler's Case*, 6 Co. 6 *b*; *Lowe's Case*, 9 Co. 123 *a*.

(*x*) Co. Lit. 74 *b*, *et seq.*; Hargrave's note (11) to Co. Lit. 88 *b*.

the next of kin of the heir to whom the fee could not descend was entitled, as guardian in socage, to hold the land until the heir was of the age of fourteen, but for the use of the heir, to whom he was bound to account on coming of age (*y*).

The lord was also entitled to the marriage of the infant ward for such value as he could obtain, or to the value of the marriage, and that whether he tendered a marriage or not. The heir might refuse a marriage tendered, subject to satisfying the lord's claim for its value; but if he married without the lord's licence, the lord was entitled to double value of the marriage by the Statute of Merton (*z*).

Marriage.

Relief was a sum payable by the heir to take up (*relevare*) the fee upon the death of his ancestor. It was common to all tenures by common law without special reservation;—in knight service a fourth part of the annual value, according to the assessment of a knight's fee;—and in socage tenure, one year's rent (*a*). In tenures *in capite* of the king, whether knight service or socage, it took the form of *primer seisin* or first fruits, being one year's profits of the fee (*b*).

Relief.

A heriot is a right in the lord upon the death of the tenant to seize his best beast, or, it may be, some other chattel, in the name of a heriot. Such right is not of general incidence, but must be claimed either by special custom or, if created since the statute of *Quia emptores*, by express grant; in the latter case it must be reserved in the form of heriot-service, and is then attended, like rent service, with the remedy of distress; in other cases it is only recoverable by seizure, as vesting in the lord immediately upon the death (*c*). The custom may be that a sum of money be assessed in the lord's court as payable in lieu of the heriot (*d*).

Heriots.

The tenant originally could not alien his fee without the licence of the lord, for granting which a fine or payment was

Fines on alienation.

(*y*) Co. Lit. 87 *b*; Hargrave's note (13) to Co. Lit. 88 *b*.

(*z*) 20 H. III. c. 6; *Palmer's Case*, 5 Co. 126 *b*; *Lord Darcy's Case*, 6 Co. 70 *b*.

(*a*) Co. Lit. 69 *b*, 76 *a*, 83 *a*, *b*; 90 *a*, *b*, *et seq.*; see Hargrave's note (2) to Co. Lit. 93 *a*.

(*b*) Co. Lit. 77 *a*. When the heir had been in ward, he sued out *livery* or an *ouster le main*, which was half a year's profit of his land, instead of a relief, or primer seisin. *Ib*.

(*c*) Co. Cop. s. 24; Elton Cop. 8, 193; *Lanyon v. Curne*, 2 Wms. Saund. 485, and notes; *Talbot's Case*, 8 Co. 104 *b*; *Damerell v. Protheroe*, 10 Q. B.

20; *Basingstoke Corp. v. Bolton (Lord)*, 1 Drew. 270; 3 Drew. 50. See *Copestake v. Hoper*, [1908] 2 Ch. 10; 77 L. J. Ch. 610.

(*d*) *Parkin v. Rudcliffe*, 1 B. & P. 282, 393. As to the extinguishment or continuance of the right to a heriot upon a purchase by the lord of part of the lands, see *Talbot's Case*, *supra*; and as to the multiplication of heriots on division of the tenement amongst several tenants, see *Garland v. Jekyll*, 2 Bing. 273; *Holloway v. Berkeley*, 6 B. & C. 2. Provision has been made by statute for the extinguishment of heriots at the instance of either lord or tenant, 21 & 22 Vict. c. 94, s. 7.

charged. The statute *Quia emptores* enabled tenants to alien without licence; but this statute did not extend to the tenants *in capite* of the crown. The claim of the crown was afterwards settled by statute at a reasonable fine, which was adjudged to be one-third of the yearly value for licence, and one year's value upon alienation without licence (*e*).

**Aids.** Aids were contributions exacted by the lord to meet his expenses upon the occasions of marrying his daughter, *aide pur file marrier*, and of making his son a knight, *aide pur faire fitz chivalier*. They were incident to both knight service and socage tenure (*f*).

**Escheat.** Escheat may be here mentioned as a right of seignory, though it is not, strictly speaking, an incident of tenure, as it occurs only upon the determination of the tenure. On failure of the heirs designated in the grant of the fee, the land *escheats* or falls back to the lord. The like occurred upon the determination of the tenure by *forfeiture*. Hence it was said "to happen two manner of ways, *aut per defectum sanguinis*, i.e., for default of heir, *aut per delictum tenentis*, i.e. for felony." (*g*).

Statute  
Car. II.  
converting  
tenures into  
common  
socage.

The statute 12 Car. II. c. 24, finally put an end to the distinctions of freehold tenures, by reducing them to the one general form of common socage, and by abolishing, with few exceptions, the special services and occasional incidents by which they were characterised (*h*).

Wardships,  
etc., taken  
away.

The statute, entitled "An act taking away the court of wards and liveries, and tenures *in capite*, and by knights service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof" provided, in effect, as follows:—(s. 1.) "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king's Majesty, or of any other by knights service, be taken away and discharged,—and that all fines for alienations, seizures and pardons for alienations, tenure by homage, and all charges incident or arising, for or by reason of wardship, livery, primer seisin or ousterlemain or tenure by knights service, escuage, and also *aide pur file marrier* and *pur faire fitz chivalier*, be likewise taken away and discharged,—and

(*e*) Co. Lit. 43 *a*, *b*; 2 Inst. 67.

(*f*) Co. Lit. 76 *a*, 91 *a*.

(*g*) Co. Lit. 13 *a*, 215 *b*; *Att.-Gen.* v. *Sands*, Hard. 488; Tud. L. C. Conv. 211; *Burgess v. Wheat*, 1 Eden, 177; 1 W. Bl. 123.

(*h*) This statute, passed in 12 Car. II., 1660, the first year of the restoration,

was made to operate retrospectively from 24 Feb. 1645 (sect. 1), that being the date from which the feudal seignories had been before suspended by parliament. A similar reform had been presented to parliament by the king in 18 Jac. I. See 4 Inst. 202.

that all tenures by knights service of the king, or of any other person, and by knights service *in capite* and by soccage *in capite* of the king, and the fruits and consequents thereof, be taken away and discharged,—and all tenures of any honours, manors, lands, tenements or hereditaments, or any estate of inheritance at the common law, held either of the king, or of any other person, are hereby enacted to be turned into free and common soccage.”

Tenures by knight service taken away.

All tenures turned into common soccage.

Sect. 4 enacted “that all tenures hereafter to be created by the king’s Majesty, his heirs or successors, upon any gifts or grants of any manors, lands, tenements or hereditaments, of any estate of inheritance at the common law, shall be in free and common soccage, and shall be adjudged to be in free and common soccage only, and not by knights service or *in capite*.”

All tenures hereafter created to be common soccage.

Sect. 5 expressly provided that the act “shall not take away any rents certain, heriots or suits of court belonging or incident to any former tenure now taken away or altered by virtue of this act, or other services incident or belonging to tenure in common soccage,—or the fealty and distresses incident thereunto; and that such relief shall be paid in respect of such rents as is paid in case of a death of a tenant in common soccage.”

Saving of rents, heriots, suits of Court, fealty, etc.

Sect. 6 provided that the act “shall not take away any fines for alienation due by particular customs of particular manors and places, other than fines for alienation of lands, or tenements holden immediately of the king *in capite*.”

Fines by custom of manors.

Sect. 7 provided “that this act shall not take away tenures in frankalmoigne, or subject them to any greater or other services than they now are; nor alter or change any tenure by copy of court roll, or any services incident thereunto; nor take away the honorary services of grand serjeanty.”

Saving of frankalmoign, copyhold, and honorary grand serjeanty.

The statute, it has been justly observed, uses very inaccurate language and undistinguishing modes of expression, especially in the title and enacting clause, as to taking away tenure *in capite*. The intention and effect is to take away such tenures so far only as they varied from common soccage, by converting them into common soccage, and not “to annihilate the indelible distinction between holding immediately of the king, and holding of him through the medium of other lords” (*i*).

The statute retained the principle of tenure and left untouched the rules of freehold tenure as regards the estate of the tenant, and the formal modes of conveyancing,—which matters are treated in the following sections of this Chapter.

(*i*) Hargrave’s note (5) to Co. Lit. 108 *a*, and notes *ib.* 85 *a*, 93 *b*.

## SECTION II. ESTATES OF FREEHOLD TENURE.

The feudal estate—extended to heirs—restricted to heirs of the body—title of heir by grant—by descent.

Fee simple at common law—limitation to heirs.

Estate for life—followed by limitation to heirs—Rule in Shelley's case.

Fee simple conditional—fee conditional upon issue—ancient instances of fee simple conditional—effect of the statute *Quia emptores* upon such limitations.

Fee tail under the statute *De donis*—efficacy of Fines and Recoveries in barring entails—Fines and Recoveries abolished and new mode of disentailing substituted—base fee.

Reversion—remainder—no reversion or remainder after fee simple—tenure of tenant to reversioner—services, etc., incident to reversion.

Freehold estates.

Lease for years—estate and tenure of lessee—leaseholds and chattels real are personal estate.

The fee or  
feudal estate.

Grant  
extended to  
heirs.

The fee or feudal estate in the land appears to have been granted, in early times, for the life of the tenant only, the land reverting to the lord upon a vacancy by death. The grant was afterwards extended to the sons and other issue of the tenant under the designation of heirs, leaving no reversionary interest in the lord except upon the failure of the heirs so designated (*a*).

A grant extending to the heirs was originally confined to the issue or lineal descendants of the first feudatory. Upon his death without issue, his brothers and other collateral relations acquired no claim under such grant; but upon the death of a tenant who had acquired the fee as heir, his collateral relations might succeed as being heirs of the original feudatory. In the former case the fee was distinguished as *feudum novum*; and in the latter, as *feudum antiquum*. The fee might be enlarged in its creation to all the heirs, collateral as well as lineal, by granting the *feudum novum* expressly to be held *ut antiquum*; and such appears in later times to have become the general construction of a grant even without that express addition; at least in the English common law a grant "to a man and to his heirs" simply, was construed as extending to the heirs general, collateral as well as lineal.

Heirs  
general.

(*a*) Wright's Tenures, p. 14; 2 Blackst. Com. 55; Butler's note to Co. Lit. 266 *b*. "Most of those who have written upon the feudal system, lay it down that benefices were originally precarious and revoked at pleasure by the sovereign; that they were afterwards granted for life; and at a subsequent period became

hereditary. No satisfactory proof, however, appears to have been brought of the first stage in this progress." Hallam's Middle Ages, Chap. 11., p. 160, 6th ed., and note *ib*.; Supplement, note 66, p. 113. See 1 Spence Eq. Jur. 45.

This extension of the term heirs at the same time necessarily required that the restriction of the fee to the lineal heirs, if intended, should be expressed in terms; such grants were accordingly made with the limitation "to the heirs of *the body*." Similarly, the grant might be restricted "to the heirs *male* of the body," or to the heirs by a certain wife, or to other restricted lines of issue (*b*).

Grant restricted to the heirs of the body.

The heir originally derived his title to the fee from the grantor by designation in the grant, *per formam doni*. But as the tenant acquired, in course of time, the power of alienating the fee, the interest of the heir became reduced to a mere expectation of succeeding, in the event of the ancestor not exercising that power. The additional grant "to the heirs" was then referred wholly to the estate of the ancestor, as importing merely an estate of inheritance, an essential incident of which was the power of transferring the land to another for a like estate; and the heir no longer claimed as grantee by designation in the grant, but derived his title from the ancestor by descent (*c*).

Title of heir by grant, —

by descent.

Such was the ultimate state of the fee simple or estate of inheritance at common law. It conferred the largest rights of use and enjoyment allowed by law, together with the largest power of alienation. A grant in fee simple left no estate or interest in the grantor, except the rights of seignory appertaining to the lord by the rules of tenure, amongst which was the right of escheat, whereby the lord was entitled to resume the possession of the land upon the death of a tenant without heirs. But even these rights could not be reserved after the statute *Quia emptores*; for by the effect of that statute the new grantee held directly of the same lord as the grantor held before (*d*).

Fee simple at common law.

Ultimately also the limitation "to the heirs," became the technical description of an estate of inheritance, which could not be legally expressed by any other means (*e*).

Limitation "to the heirs."

(*b*) Wright's Tenures, 16-18, 186; 2 Blackst. Com. 221, 222, 229; see *post*, Part II. Chap. 1. "Fee tail."

(*c*) See *ante*, p. 22; Co. Lit. 22 *b*; *Burgess v. Wheate*, 1 W. Bl. 133; 1 Eden, 191, see judgment of Clarke, M. R. and authorities there cited. Butler's note to Co. Lit. 191 *a*, V. 3; and to Co. Lit. 266 *b*.

(*d*) See *ante*, p. 12; *Burgess v. Wheate*, *supra*.

(*e*) Co. Lit. 1 *a*, 8 *b*. Words importing the power of alienation appear to have been added in feoffments, when that power became recognised; and that power may perhaps originally have

depended upon their insertion: see Madox Form. Diss. p. v. Forms 308-331. The word "assigns" is still often added; but where it follows sufficient words of limitation, it merely imports the power of alienation legally incident to the estate and is superfluous; where used alone it may be operative in giving a power of appointment. *Quested v. Michell*, 24 L. J. Ch. 722; see *Brookman v. Smith*, L. R. 6 Ex. 291, 306; 43 L. J. Ex. 161, 170. The express mention of "assigns" appears to have had some operation in extending the effect of warranties and covenants, see Bracton, 17 *b*.

Estate for life.

Before the amendment of the law to be hereafter mentioned a conveyance of the legal estate to a person simply without extending it in terms "to his heirs," or without any other limitation of the estate intended, continued to be construed according to its primitive force and effect, as conferring an estate only for the term of his life (*f*).

Estate for life followed by limitation to heirs.

The grant "to A. and to his heirs," and a grant "to A. for life and after his decease to his heirs," according to the primitive force and effect of the expressions, were manifestly identical; inasmuch as they both conferred life estates upon A., and upon the persons designated as his heirs in succession. They were still construed as identical, notwithstanding the change in the position and interest of the heir consequent upon the enlarged power of alienation in the ancestor; the limitation "to the heirs," in both cases, ceased to confer directly any estate upon the persons answering to that designation, and was referred to the estate of the ancestor, which, though expressed to be in the first place for life, it enlarged to an estate of inheritance, so that the heir took only by descent. This is the origin and simplest form of the rule in *Shelley's Case*, an ancient rule of great importance in construing the limitations of estates, which will be noticed more fully hereafter (*g*).

Rule in *Shelley's Case*.

Fee simple conditional.

At the common law all inheritances were fee simple in respect of the rights and powers of the tenant. In respect of duration, they might be absolute or conditional, that is, determinable by some conditional limitation (*h*).

Fee simple conditional upon issue.

A fee limited to a person and "to the heirs of his body" or "to the heirs male of his body" or in other form of restricted inheritance was a fee simple conditional at common law. It was determinable by failure of the line of issue designated to succeed, and the land reverted in possession to the grantor or his heirs.

(*f*) *Ante*, p. 22; Wright's *Tenures*, p. 152; Co. Lit. 9 *b*, 42 *a*, 182 *a*. See *post*, p. 119.

(*g*) 1 Hargrave's *Law Tracts*, p. 572; *Shelley's Case*, 1 Co. 93 *b*; Tud. L. C. Conv. 332. See *post*, p. 247.

(*h*) Co. Lit. 1 *b*, 18 *a*; *Scynmor's Case*, 10 Co. 95 *a*, 97 *b*; Tud. L. C. Conv. 158. There is a third kind, a *qualified or base fee*, not at common law, but resulting from certain modes of alienation by tenant in tail since the statute *de donis*; these are noticed hereafter: see *post*, p. 28.

It seems necessary here also to notice that conditions might be annexed to grants, reserving to the grantor the

right of entry to defeat the grant upon breach of the condition; but such conditions of re-entry operated differently from a conditional limitation. The fee simple conditional is determined by intrinsic force of the limitation; but a condition, strictly so called, renders the estate voidable only and not void. It may be avoided by an entry for breach of the condition; but until entry the estate continues. Conditions of this kind were implied in tenure, and might be imposed by express terms in the grant. They require no further notice at present, but will be treated hereafter as part of the existing law. See *post*, Part II. Chap. I., Sect. VI. "Conditions."



But the restriction upon the duration of the fee did not, at common law, otherwise affect the rights and powers of the tenant; and in respect of these it remained a fee simple. So long as the fee lasted the tenant for the time being had all such powers, including the power of alienation, as were the inseparable incidents of an estate of inheritance. Only it was adjudged to be a necessary condition of the full effect of his alienation, so as to bar not only his issue, but also the possibility of reverting to the grantor, that he should have heritable issue (i).

As other ancient instances of fees simple conditional, may be cited:—a fee limited to A. and to his heirs for so long as the church of St. Paul shall stand;—to A. and to his heirs, tenants of the manor of Dale;—to A. and to his heirs, so long as A. or B. has heirs of his body (k).

Ancient instances of fee simple conditional.

But the statute *Quia emptores* (l) by preventing the creation of any tenure between the grantor and grantee, where the fee was granted subsequently to the statute, put an end to any right of reverter upon such grants. Before the statute, upon the determination of the fee by the conditional limitation, the land reverted to the grantor by way of *escheat*; for, the grant having conveyed the whole fee, there was no reversionary estate left in the grantor to entitle him to the possession. But under such a grant made after the statute there could be no seignory created to which an *escheat* would be incident; and *escheat* to the superior lord could not occur until failure of the original tenure, the terms of which were not altered by the alienation of the tenant (m).

Cannot be created since statute *quia emptores*.

The statute commonly known as the statute *De donis conditionalibus* (n), after a preamble to the effect, that under such grants or gifts upon condition, to a person and the heirs of his body, it was a grievance to the donors and their heirs that the will of the donor expressed in the gift was not observed, but that, after issue begotten, the donees had power to aliene the land and

Fee tail under the statute *de donis*.

(i) *Martin v. Strachan*, 5 T.R. 107, n.; Co. Lit. 18 b, 19 a, b. It may be observed that the condition thus constructively precedent to the power of alienation, was independent of the conditional limitation of the estate, whereby it was determinable upon the failure of the issue of the donee, if the power of alienation were not exercised.

(k) See *Seymour's Case*, 10 Co. 97 b; Shepp. Touch. 101; 1 Sanders, Uses, 208; arg. *Cirdigan (Earl) v. Armitage*, 2 B. & C. 197 at p. 202.

(l) 18 Ed. I. c. 1, ante, p. 12.

(m) 1 Sanders, Uses, 200, citing *Cor-*

*bet's Case*, 2 And. 138, as an accurate expression of the law:—"that if the land be given to one and his heirs, *so long as J. S. and his heirs shall enjoy the manor of D.*, those words *so long*, etc., are entirely void and idle, and do not abridge the estate;" adopted also in 3rd Report of Real Property Commissioners. The statement in Plowden, 557, "that the feoffor shall have the land again" must refer to feoffments made before the statute. See also *Collier v. Walters*, L. R. 17 Eq. 252; 43 L. J. Ch. 216.

(n) 13 Ed. I. stat. 1, c. 1.

to disherit their issue, and to bar the donors of their reversion, which was manifestly contrary to the form of the gift, proceeds to enact "that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition, shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail" (o).

The effect of this statute was to take away from the tenant the power to alien the land, and the object of the statute was satisfied by the creation of a new estate of inheritance, known as a fee tail; and in the result, that which had been a possibility of reverter to the donor, became an estate in fee simple expectant upon the determination of the estate tail, and in law a reversion (p). The estate in fee tail (or estate tail) was so called from the inheritance being cut down, *talliatum*, to the line of heirs designated (q).

Inheritances  
not within  
the statute  
*de donis*.

The limitation of an estate to a person and "to the heirs of his body," when applied to subjects of heritable property to which the statute *De donis* does not extend, is construed, as at common law, to give a fee simple conditional upon issue;—for example, when applied to land of copyhold or customary tenure where there is no custom of entail,—or to an annuity in fee. Consequently, in such cases, the grantee, upon having issue, has the same power over the property as if seised in fee simple absolute, but there is a possibility of reverting to the grantor upon the failure of issue (r).

Efficacy of  
Fines and  
Recoveries  
in barring  
entails.

The statute by taking away the power of alienation from the tenant in tail fixed the land in perpetuity in the line of issue designated in the grant. The fee tail remained thus inalienable for about two centuries, when the Judges recognised the efficacy of *Recoveries* in conveying the land, and thereby restored in effect the power of alienation. *Recoveries* and *Fines*, which were subsequently used for the same purpose, were collusive legal proceedings concerning the land, brought for the purpose of settling the title under the process and judgment of a court of

(o) The statute gives a new remedy to the heir by a writ called a *formedon in descender*, and recites that "the writ whereby the giver shall recover when issue faileth, is common enough in the Chancery." The latter was the writ of *formedon in reverter*. These writs were abolished, together with other real

actions, by 3 & 4 Will. IV. c. 27, s. 36.

(p) See *Martin v. Strachan*, 5 T. R. 107 n, Willes, 444.

(q) Co. Lit. 18 b, *et seq.*, 22 a.

(r) Co. Lit. 20 a; *Stafford (Earl) v. Buckley*, 2 Ves. sen. 170, 180; *Doe v. Clark*, 5 B. & Ald. 458; *Doe v. Simpson*, 4 Bing. N. C. 333; 3 Man. & G. 929.

justice. The proceedings were entered upon the records of the court and, with some aid from statutes, became available as common forms of conveyance(s). By certain statutes of which the principal is 34 & 35 Hen. VIII. c. 20, tenants in tail are restrained from barring their estates tail(t).

A Fine was originally the compromise of an action concerning the land whereby the title was acknowledged and finally confirmed by the agreement of the parties, *finalis concordia*. A fine levied by tenant in tail, whether in possession, or in remainder, or merely as heir in expectancy, was effectual to bar all his issue in tail; but it was not alone effectual to bar estates or interests limited to take effect after or in defeasance of the estate tail. The efficacy of a fine rested principally upon the Statute of Fines, giving a conclusive force to a fine with proclamations(u).

A common recovery was originally a real action in which the land in question was recovered by judgment of the court. A recovery suffered by tenant in tail was effectual to convey a clear fee simple discharged of the estate tail and of all the estates and interests limited to take effect after or in defeasance of the estate tail. But it was an essential ground of this proceeding that the writ or *præcipe* should issue against the actual tenant of the freehold: consequently it could not be carried out without his concurrence(x). The efficacy of a recovery rested principally upon the decision in *Taltarum's Case*(y).

The process of barring estates tail by Fines and Recoveries was abolished by sect. 2 of the Fines and Recoveries Act, 1833(z), which gives (sects. 15 & 18) a general power to tenants in tail to dispose of the lands entailed for an estate in fee simple absolute, or for any less estate, to be exercised in the manner and with the consents and subject to the restrictions contained in the Act. The formalities prescribed by the statute must be strictly pursued, and the omission of any one of them will invalidate the transaction. But the court may enforce the specific performance of a contract to execute a disentailing

(s) See *Jennings' Case*, 10 Co. 44 a; *Martin v. Strachan*, 5 T. R. 107 n, Willes, 444.

(t) *Nottingham (Earl) v. Monson (Lord)*, Dy. 32 a, pl. 1 marginal note; *Johnson v. Derby (Earl)*, Pigott, Recoveries 201; *Grafton (Duke) v. London and Birmingham Ry.*, 5 Bing. N. C. 27; 8 L. J. C. P. 47; *Perkins v. Sewell*, 1 W. Bl. 654; 4 Burr. 2223; *Abergareenny (Earl) v. Brace*, L. R. 7

Ex. 145; 41 L. J. Ex. 120.

(u) 4 Hen. VII. c. 24; explained by 32 H. VIII. c. 36; see *Martin v. Strachan*, 5 T. R. 107.

(x) *Ireson v. Pearman*, 3 B. & C. 799. See Pigott, Recoveries.

(y) *Taltarum's Case*, Year Book, 12 Ed. IV., f. 19; see 9 L. Q. R. 1; 12 L. Q. R. 301; and see *Martin v. Strachan*, 5 T. R. 107 n, Willes, 444.

(z) 3 & 4 Will. IV. c. 74.

Fines and Recoveries abolished, and new mode of disentailing substituted.

assurance, or may rectify a mistake in a disentailing assurance, which has been actually enrolled (*a*).

Base fee.

A fine by barring the issue in tail only, and not the estates subsequently limited, conveyed what was called a *base fee* an estate of the quality of a fee simple and descendible to the heirs general of the grantee, but determinable by failure of the issue in tail, upon which event the subsequent limitations took effect (*b*).

By the Fines and Recoveries Act, "The expression '*base fee*' shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred." Such an estate is created by a disentailing deed under the statute, when executed without the required consent of the protector of the settlement (*c*).

Reversion.

If a tenant in fee simple granted to another for a term of life, the alienation of the fee was partial only, in respect of duration of time, the residue being left in the grantor; and upon the determination of the estate for life, the possession reverted or returned to him or to his heirs; whence the residuary estate left by such conveyance was called a reversion, and the estate for life was called, in relation to the reversion, a *particular* or *partial* estate (*d*).

Particular estate.

Reversion after fee tail.

So, upon a gift in fee tail after the statute *De donis* there was a reversion in the donor secured to him by the statute, and upon the death of the tenant in tail without issue, whereby the fee tail was determined, the possession reverted to the donor or his heirs (*e*).

Remainder.

A tenant in fee simple might grant a particular estate, whether for life or in tail, to one person, and at the same time grant the residue or *remainder*, technically so-called, of the fee to another, leaving no reversion in himself. A remainder is defined to be "a residue or remnant of an estate in land, expectant upon a particular estate created together with the same at one time" (*f*). So he might grant several particular estates successively in remainder, leaving the reversion in himself, or at the same time

(*a*) *Hall-Dare v. Hall-Dare*, 31 Ch. D. 251; 55 L. J. Ch. 154; *Green v. Paterson*, 32 Ch. D. 95; 56 L. J. C. 181; *Baukes v. Small*, 36 Ch. D. 716; 56 L. J. Ch. 832.

(*b*) *Seymour's Case*, 10 Co. 95 *b*, Tudor L. C. Conv. 158; see *Roe v. Baldwere*, 5 T. R. 104.

(*c*) 3 & 4 Will. IV. c. 74, ss. 1, 34, 38, 39.

(*d*) Co. Lit. 22 *b*; and see ib. 142 *b*.

(*e*) Co. Lit. 22 *a*; see *Martin v. Strachan*, 5 T. R. 107 *n*; *Roe v. Baldwere*, 5 T. R. 104.

(*f*) Co. Lit. 49 *a*, 143 *a*.

granting away the ultimate remainder in fee without leaving any reversion.

The grant of an estate in fee simple exhausted the power of the grantor; no reversion was left nor could any remainder be limited after such estate. On the determination of a fee simple for want of heirs, *per defectum sanguinis*, the land fell back to the lord by right of escheat, which was not an estate in the land, strictly so called, but a right incident to the seignory (*g*). A fee simple conditional at common law was equally extensive in this respect, and left no reversion or residue at the disposal of the grantor (*h*).

No reversion or remainder after a fee simple.

The grant of a partial or particular estate only, as an estate for life or an estate tail, created a relation of tenure between the tenant of the particular estate and the reversioner, to which fealty and services were incident according to law or the express reservation of the grant. The statute *Quia emptores*, which abolished sub-infeudation, was expressly confined to alienations of the fee simple and did not affect this tenure of particular estates to the reversion, which may still be created. It has been called an *imperfect tenure*, as distinguished from the perfect tenure incident to the seignory of the fee, in which the rent and services are incident to the seignory; in the imperfect tenure they are incident to the reversion (*i*). A grant of a particular estate and at the same time of the remainder in fee, retaining no reversion, is within the statute *Quia emptores*; no new tenure is created and both the grantee of the particular estate and of the ultimate remainder hold immediately of the lord of whom the grantor held before (*k*).

Tenure between tenant and reversioner.

If a man make a gift in tail, without any express reservation, the donee holds of the donor by the same services as the donor holds of the next superior lord; as was the case with a grant in fee simple conditional at the time of the passing of the statute *De donis*; and before the statute the donee held of the donor as of his person, but since the statute he holds of him as of his reversion. If a man makes a lease for life and reserve nothing, he shall have fealty only, though the lessor hold over by rent or other services. But if in such cases there be made a special reservation of rent or services, the terms of the tenure are regulated by the express reservation (*l*). The fealty and other

Services, etc., incident to reversion.

(*g*) See *ante*, p. 20.

(*h*) *Doe v. Simpson*, 4 Bing. N. C. 333; 3 Man. & G. 929. As to the creation of a base fee, see *ante*, p. 28.

(*i*) 18 Ed. I. s. 3; Co. Lit. 22 *a*, *et seq.*,

93 *a*, 142 *b*; Co. Cop. s. 31, Tracts, p. 48.

(*k*) Co. Lit. 142 *b*, *et seq.*; Butler's note (2) to Co. Lit. 327 *a*.

(*l*) Co. Lit. 22 *a*, 142 *b*, 151 *b*.

services are incident to the reversion and pass with it; the fealty inseparably, but the services are separable. The reversion, in respect of the fealty, rent or other services reserved or incident thereto, is a present and immediate interest; though in respect of the possession of the land it is future (*n*).

Freehold  
estates.

Estates for life and estates of inheritance, being the estates admissible at common law in land of freehold tenure, are called *freehold estates*. An estate for life is sometimes called specially an estate of freehold, or *the freehold*, as distinguished from the inheritance, which in this sense includes the freehold (*n*).

“The word freehold is now generally used to denote an estate for life, in opposition to an estate of inheritance. Perhaps, in the old law it meant rather the latter than the former. It is known that fees were held originally at the will of the lord; then, for the life of the tenant; that afterwards they were descendible to some particular heirs of the body of the tenant; then, to all the heirs of his body; and that in succession of time the tenant had the complete dominion or power over the fee. The word *freehold* always imported the whole estate of the feudatory, but varied as that varied” (*o*).

Thus the term freehold is used to denote the quantity or duration of estates as well as the tenure of the land; and, as applied to estates, even a customary tenant or copyholder may be said to have a freehold. “A tenant in fee simple, fee tail, or for life is said to have a freehold interest, whatever his *tenure* may be; but none except he who holds or did hold by knights service, in free socage, or in frankalmoign can be said to have a freehold tenure” (*p*).

Lease for  
years.

A lease for a term of years or any certain duration of time was originally considered at common law not to convey any estate in the land. The tenant or termor, though *de facto* in possession, was considered to hold the land in the name and on behalf of the freeholder who let him into possession, and who through him still retained the possession in law. He was in the position of an agent or bailiff entrusted with the possession (*q*).

His right was founded on the lease or contract which entitled him to enter and occupy during the term and upon the conditions

(*n*) 2 Cruise, Dig. tit. 17, ss. 13, 14, 15, 18 *et seq.*

(*n*) Co. Lit. 42 *b*.

(*o*) Butler's note to Co. Lit. 266 *b*;

see *ante*, p. 22.

(*p*) Blackstone on Copyholders, Tracts, p. 223; Co. Lit. 43 *b*.

(*q*) Butler's note to Co. Lit. 330 *b*.

agreed upon; and if ejected or disturbed in possession it gave him a personal action for the breach of contract, but no remedy by real action in respect of the land itself. A recovery in a real action against the freeholder defeated the possession of the termor by establishing a title paramount to that under which the possession was given; and even a recovery suffered by the collusion of the lessor had the same effect, until a statute was passed enabling termors to falsify recoveries under feigned titles (*r*).

In course of time the interest of a lessee for years, after it was perfected by entry, came to be recognised and protected in other respects as an estate in the land. In the personal action of ejectment, judgment was given for the recovery of the term, with a writ of possession. The doctrines of tenure were extended to it, so that the lessee was bound to fealty, and the rent reserved became rent service recoverable by distress. The right of the lessee for years before entry was called an *interesse termini* (*s*).

Estate of lessee.

Interesse termini.

But the estate of the termor or leaseholder has never ceased to be considered, like the lease or contract upon which it is founded, of the nature of personal property. It passes, as such, to the executor or administrator, and not, as real estate, to the heir. Such estates are called *leasehold* in contrast to *freehold*. They are called *chattel* interests, as being personal estate, and also chattels *real*, the subject of property being land or realty, to distinguish them from goods or chattels strictly *personal* (*t*).

Leaseholds or chattels real are personal estate.

(*r*) 21 Hen. VIII. c. 15.

(*s*) Co. Lit. 45 *b*, 46 *a*, *b*. See *post*, p. 150. "Till the reign of Edward IV. the possession was not recovered in an

*ejectione firme*; but only damages."

Hale, Hist. Com. Law, 201. See 3 Blackst. Com. 200.

(*t*) *Ante*, p. 6; *post*, p. 154.

### SECTION III. THE SEISIN AND CONVEYANCE OF FREEHOLD ESTATES.

Seisin—feoffment by livery of seisin—livery for particular estate and remainder—limitations shifting the seisin.

Rule against abeyance of seisin—limitation of future estates—remainders.

Possession of leasehold—lease for years—lease for years with remainder of freehold—lease to commence *in futuro*.

Deed of feoffment—statutory requirements of feoffment.

Freehold now lies in grant—rules of limitation in grants—limitation to grantor or his heirs, at common law—creates a new title by statute.

Things lying in grant—reversions and remainders—incorporeal hereditaments.

Attornment to grant at common law—abolished by statute.

Release—conveyance by lease and release.

Disseisin—conveyances having tortious operation.

Rights of entry and of action.

Seisin of the freehold.

In the earlier common law the word “seisin” described “the common law possession,” and was applied “as freely to a pig’s ham as to a manor or field” (*a*). At a later date the word was restricted to land of freehold tenure, and then signified the possession of the fee or freehold estate: the freeholder was described in law as *seised*, or invested with the seisin. The tenant in the actual possession or seisin was presumptively seised of an estate in fee simple. If entitled only for a particular estate, he held the seisin not only in his own right, but also in right of all the estates in reversion or remainder under the same title; the owners of which participated in the seisin in order of succession, and were described as seised in reversion or in remainder; for the actual seisin represented the fee, or all the estates into which it might be sub-divided (*b*).

Feoffment by livery of seisin.

The seisin, as representing the fee, was also used as the means of conveyance. Feoffment or the conveyance of a freehold estate was effected by *livery of seisin*, that is, by an actual delivery of possession. This originally constituted the efficient and essential act of conveyance, words being required only to explain the act, and, when necessary, to limit and direct the estates for which it was intended the seisin should be held (*c*).

(*a*) *Cochrane v. Moore*, 25 Q. B. D. 57, 65; 59 L. J. Q. B. 377; Co. Lit. 49 *a*, 153 *a*; Williams, Seisin, 4.

(*b*) *Leach v. Jay*, 9 Ch. D. 42; *Copestake v. Doper*, [1908] 2 Ch. 10; 77 L. J. Ch. 610; Co. Lit. 143 *a*; Butler’s note (1) to Co. Lit. 266 *b*; and cases cited, *ante*, p. 4, n. (*f*); Williams,

Seisin, 4.

(*c*) Co. Lit. 48, 49; Williams, Seisin, 99; Co. Lit. 49 *a*, 50 *a*, *b*, as to when a freehold might pass without livery. Butler’s note (1) to Co. Lit. 271 *b*, and to 330 *b*; see *Doe v. Taylor*, 5 B. & Ad. 575; 1 Hayes Conv. 12.



A feoffment might be made with an express appropriation of the seisin to a series of estates in the form of particular estate and remainders, and the livery to the immediate tenant was then effectual to transfer the seisin to or on behalf of all the tenants in remainder, according to the estates limited. But future estates could only be limited in the form of remainders, and any limitations operating to shift the seisin otherwise than as remainders expectant upon the determination of the preceding estate were void at common law. Thus, upon a feoffment, with livery of seisin, to A. for life or in tail, and upon the determination of his estate to B., the future limitation takes effect as a remainder immediately expectant upon A.'s estate (*d*). But upon a feoffment to A. in fee or for life, and after one year to B. in fee;—or to A. in fee, and upon his marriage to B. in fee;—or to A. in fee or for life, and upon B. paying A. a sum of money to B. in fee,—the limitations shifting the seisin from A. to B. at the times and in the events specified, as they could not take effect as remainders, were wholly void at common law (*e*). Such limitations became possible in dealing with uses and in dispositions by will, as will appear hereafter.

Feoffment for particular estate and remainder.

Limitations shifting the seisin, void.

The exigencies of tenure required that the seisin or immediate freehold should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready, on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims to the seisin, and to preserve it for the successors in the title (*f*).

Rule against abeyance of the seisin.

This rule had important effects upon the creation of freehold estates; for it followed as an immediate consequence of the rule, as also from the nature of the essential act of conveyance by livery of seisin, that a grant of the freehold could not be made to commence at a future time, leaving the tenancy vacant during the interval (*g*).

Limitation of future estates.

As a consequence of the same rule if a feoffment were made to A. for life and after his death and one day after to B. for life or in fee, the limitation to B. was void, because it would leave the freehold without a tenant or in abeyance for a day after the death of A. (*h*).

Limitation suspending the freehold.

A remainder limited to an uncertain person or upon an

Remainders.

(*d*) Co. Lit. 143 *a*; Williams, Seisin, 67, 169.

(*e*) Co. Lit. 378, *et seq.*; Fearne, Cont. Rem. 307.

(*f*) Butler's note (1), Co. Lit. 342 *b*.

As to the application of this rule in the case of equitable estates, see *post*, p. 108.

(*g*) *Buckler's Case*, 2 Co. 55 *a*; Cc. Lit. 217 *a*.

(*h*) Fearne, Cont. Rem. 307.

uncertain condition, and so long as the uncertainty lasted, became known as a *contingent* remainder. A remainder limited absolutely and to a determinate person, or which had become absolute and certain in ownership by subsequent events was a *vested* remainder; the remainderman was presently *invested* with a portion of the seisin or freehold (i).

Remainder  
in abeyance  
pending the  
particular  
estate.

The seisin or freehold in remainder might be in abeyance during the continuance of the particular estate; for the present seisin of the tenant of that estate was sufficient to satisfy all the requirements of tenure, and it represented and supported all the future estates and interests, whether vested or contingent, in the fee. But it was essential that it should have become certain and absolute at the time when the particular estate determined; and if not then ascertained, so as to be capable of taking up the seisin, it failed altogether, and the next estate in remainder took immediate effect (k). As will be mentioned hereafter, contingent remainders, which alone were affected by the feudal rule respecting the abeyance of the freehold, are now preserved from destruction by statutes (l). It may also be observed here, that a contingent remainder, whether legal or equitable, is void if obnoxious to the rule against perpetuities, unless saved by the statute *De donis* (m).

Possession of  
leasehold.

As before stated, the word *seisin* has ceased to be used to describe the interest of a tenant for years or leaseholder in his own right; he has no participation in the freehold, and is described in law simply as *possessed*. But his possession, being referred to the title of the freeholder under whom he holds, constitutes the seisin. The freeholder is still described as seised, though his seisin is subject to the lease for years (n).

Lease for  
years did not  
require livery.

As a lease for years did not import a transfer of the seisin or freehold, it required no livery; and at common law a lease for years might be made by mere parol, without deed or writing. The Statute of Frauds, 29 Car. II. c. 3, s. 1, required all leases to be made in writing and signed by the lessor or his agent; excepting (s. 2) leases not exceeding three years from the making and on which a rent of two-thirds at least of the full value is reserved. The statute 8 & 9 Vict. c. 106, s. 3, enacted that all

Statute re-  
quiring leases  
to be in  
writing.

Statute re-  
quiring deed.

(i) Fearn, Cont. Rem. 215, see *ante*, p. 32.

(k) Fearn, Cont. Rem. 3, 281, 307. See *per* Farwell J., *Re Ashforth*, [1905] 1 Ch. 535, at p. 542, *et seq.*; 74 L. J. Ch. 361.

(l) See *post*, p. 240.

(m) 13 Ed. I., stat. 1, c. 1; *Abbiss v. Burney*, 17 Ch. D. 211; *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. Ch. 361. See *post*, p. 318.

(n) *De Grey v. Richardson*, 3 Atk. 469; Co. Lit. 200 b; Butler's note (1) to Co. Lit. 330 b, *ante*, pp. 30, 31.

leases, required by law to be in writing, should be void at law unless made by deed (o).

If a lease were made for years with remainder over to another for an estate of freehold, for life or in tail or in fee, it was necessary for the lessor to make livery of seisin to the lessee for years before entry, in order to pass the remainder. If the lessee entered before livery, his estate in the term was perfected by the entry and the freehold and reversion was in the lessor; and livery of seisin could not afterwards be made without the assent of the lessee, because the possession was already in the lessee (p).

Lease for years with remainder of freehold.

If a lease were made for years with a contingent remainder of freehold, the limitation in remainder was wholly void, because it left the seisin in abeyance until the happening of the contingency; nor could livery be given for such an estate for want of a present certain grantee of the freehold (q). Thus, "it is a general rule, that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it" (r).

Lease for years with contingent remainder of freehold.

A lease for a term of years might be made to commence *in futuro*, though a grant of the freehold could not; because such lease was merely an executory contract as to the possession, which might be executed at the time agreed upon; "as if a man make a lease for years to begin at Michaelmas next ensuing, it is good" (s).

Lease for years to commence *in futuro*.

A deed or charter of feoffment was generally used to attest the livery of seisin and record the terms of the grant. Livery of seisin was then expressed to be made according to the form of the deed, *secundum formam cartæ*; and a memorandum of such livery was endorsed upon the deed. The deed or charter was not necessary to the feoffment at common law; and in case of variance between the terms of the deed and of the feoffment, the latter as the efficient act prevailed; unless the feoffment was expressly made according to the form of the deed, when the deed regulated the effect of the feoffment (t).

Deed or charter of feoffment.

The Statute of Frauds, 29 Car. II. c. 3, s. 1, first made a

Statutory requirements of feoffment,—writing.

(o) See Co. Lit. 48 a, 200 b.

(p) Co. Lit. 49 a; Williams, Seisin, 100. See *Doe v. Taylor*, 5 B. & Ad. 575.

(q) *Ante*, p. 33; Co. Lit. 217 a.

(r) Fearn, Cont. Rem. 281. See *Lloyd v. Brooking*, 1 Vent. 188.

(s) *Barwick's Case*, 5 Co. 94 b. See *Neale v. Mackenzie*, 1 M. & W. 747, 759; and see *ante*, p. 31.

(t) *Sharp's Case*, 5 Co. 26 a; *Samme's Case*, 13 Co. 54 b. Thus—"If a man make a charter in fee and deliver seisin for life *secundum formam cartæ*, the whole fee simple shall pass."—"If a man make a lease for years by deed and deliver seisin according to the form and effect of the deed, yet he hath but an estate for years and the livery is void." Co. Lit. 48 a.

Deed. writing necessary to a feoffment by enacting "that estates made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of estates at will only." And the Real Property Act, 1845, s. 3, enacted "that a feoffment made after October 1, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced by deed" (u).

Freehold now lies in grant as well as in livery.

The same statute dispensed with livery of seisin altogether by enacting (s. 2) that "after 1 October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." Since this enactment a deed of grant alone is sufficient to convey freehold estates, and feoffment by livery of seisin may be described as obsolete, except in the case of a conveyance by a minor of gavelkind lands in Kent (x). The word "grant" has ceased to be a term of art, if indeed it ever was (y).

Rules of limitation in grants.

It will be observed that no attempt has been made to alter the rules of common law above stated concerning the limitation of estates; and although a deed of grant is now made effectual to pass the seisin and freehold without livery, it is not made effectual to pass the seisin *in futuro*, or to shift or suspend the seisin, or to leave it in abeyance. The same rules of limitation of estates apply now to a grant of the freehold, as before applied to a feoffment by livery of seisin (z). It is different with a grant operating under the Statute of Uses to be noticed hereafter (a).

Limitation to grantor at common law.

It was impossible for a person to make a direct conveyance to himself, so as to alter his title to his own property and take as purchaser from himself, by feoffment, grant, or any mode of conveyance known to the common law. The maxim applied "*nemo potest esse agens et patiens*"; he could not be both feoffor and feoffee, or grantor and grantee. So, if upon a feoffment or grant he limited the estate to himself for life, with remainder to another, the remainder was void for want of a particular estate

(u) 8 & 9 Vict. c. 106. See *Zimble v. Abrahams*, [1903] 1 K. B. 577; 72 L. J. Q. B. 103. It might be effective as an agreement; see Leake, *Contracts*, pp. 156, *et seq.*

(x) See *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525; 64 L. J. Ch. 678.

(y) *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 49. See *Chester v. Willan*, 2 Wms. Saund. 283, and notes.

(z) See *ante*, p. 33; *Doe v. Prince*, 20 L. J. C. P. 223.

(a) *Post*, Part I. Chap. III. "Law of Uses."

to support it (*b*). By making a conveyance to another and taking a re-conveyance to himself and his heirs, he might acquire a new title by purchase, which, if effective, would make an important difference in tracing the descent (*c*).

Nor could a person by any common law conveyance make his heir a purchaser, for it was a maxim that *hære est pars antecessoris*. Thus, if a man made a gift in tail, or a lease for life, with remainder to his own right heirs, the limitation of the remainder was inoperative, being merely descriptive of the reversion remaining in him; so if the remainder were limited to the heirs male of his own body, this was a void remainder, for the donor could not make his own right heir a purchaser (*d*).

Limitation to heirs of the grantor.

By the statute 3 & 4 Will. IV. c. 106 (the Inheritance Act, 1833), s. 3, it is enacted that "when any land shall have been limited by any assurance (executed after 31st December, 1833), to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof" (*e*).

Limitation to grantor or his heirs creates new title by statute.

In the case of land where the title held has been registered under the Transfer of Land Acts, 1875 and 1897 (*f*), written instruments are not dispensed with, nor is the old method of conveying entirely superseded (*g*).

Registered land.

The distinction between grant and livery referred to the subject of conveyance. Things incapable of actual possession, of which, therefore, no livery could be made, were said to *lie in grant*, that is to say, were conveyed by a deed of grant (*h*).

Distinction of grant and livery,—things lying in grant.

Reversions and remainders, being incapable of possession during the continuance of the particular estate, were not the subject of livery, but were conveyed by deed of grant (*i*). If the

Reversions and remainders.

(*b*) *Bingham's Case*, 2 Co. 91; *per* Hale, C. J., in *Pibus v. Mitford*, 1 Vent. 378; *Southcot v. Stowell*, 2 Mod. 210; 1 Sanders, Uses, 129. From the principle of the common law that husband and wife are one person, it followed that a husband could not during the coverture by any conveyance at common law limit an estate to his wife.

(*c*) Co. Lit. 12 *b*; *Doe v. Morgan*, 7 T. R. 103. A person might also convey to himself under the Statute of Uses. See *Rex v. Balduere*, 5 T. R. 104.

(*d*) Co. Lit. 22 *b*, "without departing of the whole fee simple out of him." *Greswold's Case*, Dyer, 156 *a*.

(*e*) *Heywood v. Heywood*, 34 Beav. 317; *Nanson v. Barnes*, L. R. 7 Eq. 250. See 1 Hayes Conv. 315.

(*f*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*g*) *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 631; 72 L. J. Ch. 336. See forms published with the Land Transfer Rules, 1903.

(*h*) As to the meaning of the word "grant," see Shep. Touch. 228; *Chester v. Willan*, 2 Wms. Saund. 283; *Doe v. Prince*, 20 L. J. C. P. 223; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 49.

(*i*) See *Doe v. Cole*, 7 B. & C. 243.

tenant of the particular estate and the reversioner joined in a feoffment, though without deed, it was supported by means of an implied surrender of the particular estate to the reversioner preceding the livery by him (*k*). So, a feoffment by the reversioner to the tenant of the particular estate might be supported by an implied surrender of the particular estate preceding the livery (*l*).

Future limitations of reversions and remainders.

Future limitations of an estate in reversion or remainder were subject to the same rules as a feoffment of the present seisin. A grant of a reversion or remainder could not be made to A. from Christmas next, or to A. for life and after his death and one year to B.; but it might be made for a particular estate with remainder, vested or contingent, as to A. for life with remainder to B., or with remainder to the heirs or children of B. not yet born (*m*).

Incorporeal hereditaments.

The class of rights and interest in land known as incorporeal hereditaments, comprising seignories, rents and services, rights of profit or use in the land of another, as rights of common, rights of way and the like, when taken as separate subjects of property and not as incident or appurtenant to other land, being incapable of actual possession or seisin, lie in grant, that is, are conveyed by deed of grant; nor can any estate or interest in them be created except by deed (*n*).

Attornment to grant necessary at common law.

Upon the grant of a manor or seignory to which tenure with rent or other services was incident, attornment or consent of the tenant to hold of the grantee was necessary at common law to give effect to the grant, as it was to perfect a grant of the reversion of a particular estate, for years, or for life, or in tail (*o*). The necessity for attornment in these cases was taken away by the statute of 4 Anne, c. 16; but the statute provides that the tenant shall not be prejudiced or damaged by payment of any rent to any grantor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the grantor (*p*). And the Distress for Rent Act, 1737 (*q*), after

Grant made effectual without attornment by statute.

(*k*) *Bredon's Case*, 1 Co. 76 *a*; *Treport's Case*, 6 Co. 15 *a*; see *Doe v. Lynes*, 3 B. & C. 388; Co. Lit. 48 *b*.

(*l*) *Launcel v. Aller*, Dyer, 358 *a*.

(*m*) See *ante*, p. 33; 1 Hayes Conv. 21.

(*n*) Co. Lit. 9 *b*, 49 *a*, 121 *b*, 172 *a*; *Somerses (Duke) v. Fogwell*, 5 B. & C. 875; *Gardiner v. Williamson*, 2 B. & Ad. 336; see *Coryton v. Litheby*, 2 Wms. Saund. 362 *n*. (*c*).

(*o*) *Thursby v. Plant*, 1 Wms. Saund. 281 *n* (4); *Vigers v. St. Paul's (Dean)*, 14 Q. B. 909; 19 L. J. Q. B. 84. See Butler's note (1), Co. Lit. 309 *a*. The attornment of a tenant could not be compelled even in Chancery. Cary, p. 5.

(*p*) 4 Anne, c. 16, ss. 9, 10; *De Nicholls v. Saunders*, L. R. 5 C. P. 589; *Cook v. Guerra*, L. R. 7 C. P. 132.

(*q*) 11 Geo. II. c. 19, s. 11.

reciting that the possession of estates in land is rendered very precarious by the frequent and fraudulent practice of tenants in attorning to strangers who claim title to the estates of their landlords or lessors, enacts that all such attornments of any tenants shall be absolutely null and void, and the possession of their respective landlords or lessors shall not be anywise changed, altered or affected by any such attornments.

Attornment  
to adverse  
claimant void.

A grant of a reversion or remainder to a person having a prior vested estate in the land was distinguished as a *Release*. Such conveyance, like a grant, required to be by deed under seal, and differed from a grant only in its special effect and operation in enlarging the previous estate (*r*).

Release.

A lessee for years, or even a lessee at will, after entry, might take the freehold reversion by release; but not before entry, because he then had but an *interesse termini* and no possession, and the release by way of enlarging an estate could only operate upon a possession; before entry there was no reversion and the immediate freehold could only pass by livery (*s*).

Release to  
lessee for  
years.

The capacity of a lessee for years to take the reversion by release, supplied the means in early times of conveying an immediate freehold without livery of seisin. A lease for a year was first made under which the lessee obtained possession by entry, and was then in a position to take the reversion by release. By the lease and release thus executed the freehold was conveyed as effectually as by feoffment with livery of seisin (*t*).

Conveyance  
of freehold  
by lease and  
release  
without  
livery.

After the passing of the Statute of Uses (*u*) the necessity of an actual entry to perfect the estate of the lessee was obviated by making a bargain and sale for a year instead of a lease for a year at common law; a use was thereby created in the lessee which was at once executed in possession by mere force of the statute, as hereafter explained. In this form the conveyance by lease and release, without entry or livery of seisin, continued in use for the transfer of freehold estates until quite recent times (*x*).

Lease for  
years by  
bargain and  
sale without  
entry.

The statute 4 Viet. c. 21, s. 1, further simplified this mode of conveyance by rendering a release alone as effectual for the conveyance of freehold estates as if the releasing party had also

Statute  
making re-  
lease effectual  
without lease.

(*r*) Lit. s. 465; Co. Lit. 273 *a*; as to the different kinds and operations of releases, see Lit. s. 444; Co. Lit. *ib.*; Butler's note (1) to Co. Lit. 267 *a*.

(*s*) Co. Lit. 46 *b*, 270 *a*. See *Doe v. Walker*, 5 B. & C. 111.

(*t*) 2 Sanders, Uses, 62, citing Year Books, 11 Hen. IV., 33; 21 Ed. IV. 24.

(*u*) 27 Hen. VIII. c. 10.

(*x*) 2 Sanders, Uses, 62; see *post*, p. 85.

executed a deed of bargain and sale or lease for a year for giving effect to such release.

Lease and  
release  
superseded  
by grant.

But the conveyance by lease and release is now superseded altogether by a simple direct conveyance by deed, or a transaction under the Transfer of Land Acts (*y*).

Disseisin.

*Disseisin* was a wrongful entry upon the land and *ouster* or dispossession of the freeholder. An entry, or perception of the rents and profits, under colour of an adverse title, although evidence of an ouster, might be explained by the circumstances, and not amount to a disseisin (*z*). The disseisor acquired, by his wrongful act, an estate in fee simple, as against all but the real owner, and upon this title he might maintain an action of ejectment against a stranger to the title who had ousted him (*a*). The disseisee retained a mere right of entry which, if exercised within the limits of time which were periodically fixed by law, re-vested the estate in him (*b*).

Disseisin  
divested  
remainders  
and reversion.

Disseisin of the tenant of a particular estate disseised or divested all the estates in remainder or reversion, and converted them into mere rights of entry, exerciseable in their order of succession (*c*).

Conveyances  
having  
tortious  
operation,—  
feoffment by  
tenant of  
particular  
estate,

The tenant himself of the particular estate whether for life, or for years, having the actual seisin, had it in his power to make a feoffment to another by livery, which effectually conveyed the fee, if it in terms imported to do so, irrespectively of his own estate or interest; and such feoffment disseised all the estates in remainder or in reversion dependent upon his seisin and converted them into rights of entry (*d*). Feoffment by tenant in tail operated rightfully at common law, but was provided against by the statute *De donis*, giving a writ of *formedon* to the issue or reversioner or remainderman. It therefore took away the right of entry and left only the right of action under the statute (*e*).

operated as a  
forfeiture,

But such act on the part of the tenant for life or for years was a direct breach of the conditions of his tenure, and operated as a forfeiture of his estate, which thus became merged or extinguished in the reversion or seignory, and the reversioner or

(*y*) See *ante*, p. 36.  
(*z*) *Jerritt v. Weare*, 3 Pri. 575;  
*Bushby v. Dixon*, 3 B. & C. 298. See  
*Lyell v. Kennedy*, 14 A. C. 437; 59 L. J.  
Q. B. 268.

(*a*) *Asher v. Whitlock*, L. R. 1 Q. B.  
1; *Leach v. Jay*, 9 Ch. D. 42; 47 L. J. Ch.  
876; *Rosenburg v. Cook*, 8 Q. B. D. 162;

51 L. J. Q. B. 170; *Perry v. Glissold*,  
[1907] A. C. 73; 76 L. J. P. C. 19.

(*b*) See *post*, p. 42.

(*c*) See *ante*, p. 32.

(*d*) Co. Lit. 330 *b*, and Butler's note  
(1) *ib*.

(*e*) Co. Lit. 326 *b*, 327 *a*, *b*; see *ante*,  
p. 26.



next remainderman became entitled to the immediate possession with the right to enter accordingly (*f*).

In such case if the next estate in remainder was then in contingency so that it could not take effect in possession, it failed altogether, and the next vested remainder took immediate effect, because the freehold could not remain in abeyance. Contingent remainders might thus be destroyed by a feoffment of the tenant of the particular estate; and it was formerly the practice to use feoffments for this purpose (*g*). Sect. 4 of the Real Property Act, 1845 (*h*), provided that a feoffment executed after October 1, 1845, should not have a tortious operation. It is possible that the courts would have held that this enactment had overridden the decided cases (*i*). But the matter was put beyond doubt by sect. 8 of the same statute, which provided that contingent remainders should be capable of taking effect, notwithstanding the determination by forfeiture of any preceding estate of freehold in the same manner as if such determination had not happened.

destroyed  
contingent  
remainders.

Contingent  
remainders  
preserved by  
statute.

A fine or recovery, in general, had the same efficacy as a feoffment in conveying the fee, if it purported to do so; and if by a tenant for life, it induced a forfeiture of his estate if the estate in remainder were vested, but destroyed contingent remainders immediately expectant (*k*). This cause of forfeiture was abolished by the Fines and Recoveries Act, 1833, s. 2 (*l*).

Fines and  
recoveries.

Conveyances by deed without livery, as a grant, release, or a lease and release, in whatever terms, had no effect beyond the estate and interest which the person executing might rightfully convey. Those conveyances only which operated directly upon the seisin, as feoffments, fines and recoveries could operate tortiously according to their import, irrespectively of the estate of the party conveying (*m*). So, of things lying in grant as rents, commons, reversions and remainders, the conveyance, though importing to be in fee, had no tortious effect, nor did it induce a forfeiture, for nothing passed thereby but that which rightfully might pass (*n*).

Grant and  
release had  
no tortious  
operation.

(*f*) Co. Lit. 233 *b*, Butler's note, *ib.*; Co. Lit. 251 *a*, *b*, 252 *a*; Gilbert's Tenures, 38, 39; see *Doe v. Lynes*, 3 B. & C. 388.

(*g*) *Archer's Case*, 1 Co. 66 *b*; *Hasler v. Sutton*, 1 Bing. 500. See *post*, p. 238.

(*h*) 8 & 9 Vict. c. 106.

(*i*) See *Smith v. Clyfford*, 1 T. R. 738.

(*k*) *Smith v. Clyfford*, 1 T. R. 738;

*Doe v. Gatacre*, 5 Bing. N. C. 608. As to the effect of a fine or recovery by tenant in tail, see *ante*, p. 26. Fine by lessee for years operated only by estoppel between the parties and had no ulterior effect; see *Fermor's Case*, 3 Co. 77 *a*; *Parbhurst v. Smith*, 3 Atk. 135, 141.

(*l*) 3 & 4 Will. IV. c. 74.

(*m*) Co. Lit. 332 *a*; Butler's note to Co. Lit. 330 *a*.

(*n*) Co. Lit. 251 *b*.

Right of  
entry.

An entry on the land within the time allowed by law restored the seisin, and, if made by the tenant of a particular estate, it restored or revested the estates in remainder or reversion, which were dependent upon the same title. Hence a right of entry was sufficient to preserve a contingent remainder (*o*). It is to be observed that the entry of the disseisee before his right is barred by lapse of time restores him to his former title by relation back. He may therefore maintain an action against a trespasser for a wrong done between the date of disseisin and entry (*p*). And even before a change in the law enabled after-acquired freehold estates to be devised, the entry of the disseisee validated a devise of lands made while he was out of possession (*q*).

Right of  
entry lost by  
descent cast,

The right of entry, arising upon a disseisin, was lost in certain events; as by the seisin being cast by descent upon the heir of the disseisor, which was technically called a *descent cast* (*r*);—also by an alienation of the fee by the disseisor to another, which was called a *discontinuance* of the possession (*s*). On the other hand, the right of entry might be kept alive against a descent cast by the process of *continual claim* (*t*).

by discon-  
tinuance,  
preserved by  
continual  
claim.

Right of  
action.

Where the right of entry was lost there remained a mere right of action, to be prosecuted within certain limits of time in the form of real action provided for the circumstances of the case (*u*).

Statute  
abolishing  
real actions,

The doctrines concerning rights of entry and of action and the proceedings in real actions were highly technical and elaborate, and formed a large and complicated branch of the law of real property, until the amendments of the law made by the Real Property Limitation Act, 1833 (*x*). By that statute, s. 36, real actions were put an end to with three exceptions, which were subsequently abolished, and the action of ejectment, or as it is now known, an action for the recovery of land, is the appropriate remedy at law for the recovery of the possession of land. By the same statute the right of entry or action is no longer defeated by a *descent cast* or a *discontinuance* (s. 39); and and it is exempted from all other casualties except lapse of time.

descent cast  
and discon-  
tinuance.

Limitation of  
entry or  
action

But it must be prosecuted within twelve years next after the

(*o*) *Archer's Case*, 1 Co. 66 b; Fearn, Cont. Rem. 286.

(*p*) *Barnet v. Guildford (Earl)*, 11 Ex. 19; 24 L. J. Ex. 281; *Ocean Accident and Guaranty Corp. v. Ilford Gas Co.*, [1905] 2 K. B. 493; 74 L. J. Q. B. 799.

(*q*) See note 4 to *Duppa v. Mayo*, 2

Wms. Saund. 380, at p. 401.

(*r*) Lit. s. 385; Co. Lit. ib.

(*s*) Lit. s. 592; Butler's note to Co. Lit. 325 a.

(*t*) Lit. ss. 414, 417, 422, 423.

(*u*) See Butler's note (1) to Co. Lit. 239 a.

(*x*) 3 & 4 Will. IV., c. 27.

accrual of the right, unless the person entitled is under disability (*y*).

A right of entry was not assignable at common law by deed, nor by will; though it might be released to the person in actual seisin of the freehold; and if not so released it descended to the heir (*z*). A right of entry, whether immediate or future, and whether vested or contingent, may now be disposed of by deed: Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 6; and may be devised by will: Wills Act, 1837 (1 Vict. c. 26), s. 3; and will descend in the same manner as the land, if recovered, would descend: Inheritance Act, 1833 (3 & 4 Will. IV., c. 106), ss. 1, 2.

Assignment  
of right of  
entry.

#### SECTION IV. § 1. DESCENT AND § 2. DISPOSITION BY WILL.

##### § 1. DESCENT.

Seisin as root of descent—descent traced from purchaser under the Inheritance Act.

Descent restricted to the blood of the purchaser—breaking the descent.

Half blood excluded at common law—doctrine of *possessio fratris*—half blood admitted by the Inheritance Act.

Descent in tail.

Preference of males—preference of the paternal line.

Primogeniture—parceners.

Lineal ancestors excluded at common law—collateral descent—lineal ancestors admitted by the Inheritance Act—collateral descent excluded.

Right of representation to deceased ancestor.

As the seisin presumptively represented the fee, so it was also taken as the root of descent,—as expressed in the maxim *seisina facit stipitem*. The title by descent was traced from the person last seised (*a*). The heir originally derived title from the terms of the grant, *per formam doni*, and must accordingly have traced his descent from the original grantee or purchaser; but the adoption of the seisin as the root of descent was a maxim of convenience to avoid further inquiry into the origin of the title (*b*).

Seisin the  
root of  
descent.

(*y*) Real Property Limitation Act 1874, 37 & 38 Vict. c. 57.

(*z*) Co. Lit. 214 *a*, 266 *a*; Perkins, ss. 85, 86, 156, 271; see *Culley v. Taylerson*, 11 A. & E. 1008, 1020.

(*a*) Co. Lit. 11 *b*; Bracton, 65 *b*; 2 Blackst. Com. 209; Williams, Seisin, 51.

(*b*) See *ante*, p. 22; Wright, Tenures, 185.

Seisin of  
heir,

According to the above maxim, an heir, by obtaining seisin in fact, (either by entry or through the possession of a tenant), constituted himself a new root of inheritance; his heir was not necessarily the heir of the purchaser. The seisin in law which vested in an heir before entry was not sufficient to change the root of descent from his ancestor, as being the person last seised (*c*). A purchaser, or person entitled otherwise than by descent, had in all cases sufficient seisin to make the root of descent (*d*). A disseisor could transmit the seisin by descent, and the descent cast (until January 1, 1834) took away the right of entry of the disseisee (*e*).

of purchaser,

of disseisor.

Descent from  
purchaser,  
under Inheri-  
tance Act.

The Inheritance Act, 1833 (*f*) (applying to all descents after that date), restored the original principle of descent by enacting that "in every case descent shall be traced from the purchaser." But it added the rule that "the person last entitled to the land shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same." This rule, enacted as a substitute for the above common law maxim as to seisin, "to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require," more nearly satisfies the original principle of reaching the purchaser.

Descent re-  
stricted to  
blood of  
purchaser.

Notwithstanding the force attributed to seisin as the root of descent, the principle of descent from the purchaser appeared in the rule of common law which confined the descent to the blood of the purchaser; according to which rule the heirs on the mother's side were excluded from an inheritance descended from the father, and conversely (*g*). The above rule is now included as a consequence of the new rule of the Inheritance Act, 1833, that in every case descent shall be traced from the purchaser.

Breaking the  
descent.

A person taking by descent might by various means acquire a new title by purchase and so break the former line of descent and constitute himself a new root, not only as regards the seisin, but for all purposes. He might thus admit both his paternal and maternal lines of heirs, on whichever side the inheritance might have descended upon him. The Inheritance Act (s. 3) renders a direct conveyance to himself sufficient for this purpose, before which enactment it required, at common law, a feoffment

(*c*) Co. Lit. 14 *b*, 15 *a*; *Goodtitle v. Newman*, 3 Wils. 516.

(*d*) *Doe v. Thomas*, 3 Man. & G. 815.

(*e*) See *ante*, p. 42.

(*f*) 3 & 4 Will. IV., c. 106; Carson,

Real Prop. Statutes, p. 374.

(*g*) Co. Lit. 12 *a*; *Goodtitle v. White*, 15 East, 174; *Doe v. Willan*, 2 B. & Ald. 84. See *Hawkins v. Shewen*, 1 Sim. & S. 257.

and re-feoffment, or conveyance and re-conveyance, to break the line of descent (*h*).

The same principle of descent from the purchaser extended at common law to the general exclusion of relations of the half blood of the person last seised, upon the ground that they were as likely not to be, as to be, descended from the purchaser (*i*).

Half-blood excluded at common law.

Hence the peculiar effect of the *possessio fratris*, or seisin of a brother inheriting from the father, in excluding a brother of the half blood from the future inheritance. Thus, where the father died seised in fee simple, leaving a son and daughter by a first marriage and a son by a second marriage, if the eldest son entered and died without issue, the daughter inherited and not the younger son, though he was next heir to the father, because the descent was traced from the eldest son as the person last seised, to whom the half brother could not inherit; but if the elder son died without entry, the younger son inherited, and not the daughter, because the descent was then traced from the father. The inheritance of the sister to the exclusion of the half brother was expressed in the maxim, *possessio fratris de feodo simplici facit sororem esse heredem* (*k*).

Doctrine of *Possessio fratris*.

The Inheritance Act, 1833, s. 9, enacts "that any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir;" and it assigns the place in which any such relation by the half blood shall stand in the order of inheritance, giving priority to the relations of the whole blood.

Half blood made capable by the Inheritance Act.

An heir in tail still claims *per formam doni*, by substitutional gift and not by right of descent; and the title to a fee tail must in all cases be traced from the original donee in tail (*l*). Hence the doctrine of *possessio fratris* had no application to a fee tail, for the seisin of the heir in tail did not change the root of descent. The half blood coming within the description of the entail are as capable of succeeding as the whole blood (*m*).

Descent in tail.

The exigencies of feudal tenure required an efficient tenant to perform the services and duties of the fee. Hence as a general

Preference of males.

(*h*) Co. Lit. 12 *b*; see *ante*, p. 36.

(*i*) Co. Lit. 14 *a*; Hargrave's note (3) thereto.

(*k*) Co. Lit. 14 *b*; see *Goodtitle v. Newman*, 3 Wils. 516; *Doe v. Keen*, 7 T. R. 386; *Buchanan v. Harrison*, 1 J. & H. 662; 31 L. J. Ch. 74.

(*l*) See *ante*, p. 25; *Wills v. Palmer*, 5 Burr. 2615; *Williams, Seisin*, 65; *Bracton*, 68 *b*, 69 *a*; 2 *Blackstone*, 221, 222.

(*m*) Co. Lit. 14 *b*; *Doe v. Wichelo*, 8 T. R. 211, per *Kenyon, C. J.*; *Watkins, Descent*, 95.

rule of descent males were preferred to females in each degree ; or, as it was expressed, the *worthiest of blood* should inherit. Therefore the son was preferred before the daughter, the brother before the sister, the uncle before the aunt (*n*).

Preference of  
the paternal  
line

According to this rule, in collateral descent from a purchaser, though the heirs on the side of both parents might inherit, yet all those on the father's side, including females, were preferred before any on the mother's side. Thus Coke says : " Here it is to be understood that the father hath two immediate bloods in him, viz., the blood of his father and the blood of his mother. And both these bloods of the part of the father must be spent before the heir of the blood of the part of the mother shall inherit. And the reason of all this is, for that the blood of the part of the father is more worthy, and more near in judgment of law, than the blood of the part of the mother " (*o*).

Primogeni-  
ture.

The exigencies of feudal tenure also required, in general, a single tenant to secure the performance of the services and duties of the fee ; and the eldest was selected amongst males of equal degree, except in the cases where the custom of gavelkind obtained, as in Kent (*p*).

Parceners.

With females, there being no capacity for the active duties of tenure, all took together as one heir to their ancestor ; but the law enabled them to obtain a partition of the land, whence they were called *parceners* (*q*).

Lineal ances-  
tors excluded  
at common  
law.

The common law excluded lineal ancestors as such, it being a maxim that an inheritance could descend but not ascend (*r*), but it admitted collaterals to inherit in their own right, as brothers and sisters, uncles, great-uncles, etc., who were traced from the ancestors in ascending order. Hence, according to Coke, " a division of heirs, viz., lineal (who shall first inherit) and collateral (who are to inherit for default of lineal) ; for in descents it is a maxim in law, *quod linea recta semper preferatur transversali*. Lineal descent is conveyed downward in a right line ; as from the grandfather to the father, from the father to the son, etc. Collateral descent is derived from the side of the lineal ; as grandfather's brother, father's brother, etc.—and the father's brother and his posterity shall inherit before the grand-

(*n*) Co. Lit. 14 *a*.

(*o*) Co. Lit. 12 *b* ; and see Co. Lit. 14 *a*.

(*p*) Co. Lit. 14 *a*. See *ante*, p. 17 ; Glanvill, l. 7, c. 3 ; Hale's Hist. of Common Law, by Runnington, 312.

(*q*) *Doe v. Pearson*, 6 East, 173 ; *Rea v. Bonsall*, 3 B. & C. 173 ; see *Doe v.*

*Rowlston*, 2 Taunt. 441 ; *Doe v. Dixon*, 5 A. & E. 834 ; 6 L. J. K. B. 61 ; Co. Lit. 163 *b*. The common law writ of partition was taken away by 3 & 4 Will. IV. c. 27, s. 36, and the proceeding is now by action for partition.

(*r*) Lit. s. 3 ; Co. Lit. 10 *b*, 11 *a*.

father's brother and his posterity" (s). As the inheritance could not ascend in a right line, the father could not succeed to the inheritance of the son except as collateral heir to the uncle, if the latter by dying seised formed a new root of descent (t).

The Inheritance Act, 1833, altered the law both as to lineal ancestors and collaterals. It renders the lineal ancestors capable of inheriting and ranks them in ascending order next after the issue of the purchaser; and at the same time it excludes collateral inheritance, except by right of representation to the ancestor (u).

Lineal ancestors admitted by the Inheritance Act.  
Collateral descent excluded.

The right of representation to a deceased ancestor, who, if he had lived, would have inherited, remains as at common law; his eldest son or other lineal heir inherits by right of representation. Thus, a child or grandchild or remoter lineal descendant of a deceased eldest son succeeds before a younger son. "Whensoever the father, if he had lived, should have inherited, his lineal heir by right of representation shall inherit before any other, though another be, *jure propinquitatis*, nearer of blood" (v).

Right of representation to deceased ancestor.

The modern rules governing the devolution of an estate in fee simple as settled by the Inheritance Act, 1833, may be thus summarised:—

I. The descent is traced from the purchaser in the descending scale. Males are preferred to females. And among males primogeniture prevails.

II. In default of lineal descendants, the line is traced upward with a like preference for the male line and seniority, but the line is never to be traced upward further than the exigencies of the case require; and as soon as an ancestor is found who had descendants the line is traced downward, as in rule I., until that posterity is exhausted.

III. Where females inherit, if there is more than one, all members of the same class take an equal partible share which devolves in the descending scale upon the descendants of the daughter with priority of males and birth as in rule I., and failing descendants the line is traced in an upward and downward scale, as in rule II. (y).

IV. Where relations of the whole blood fail, relations of the half blood succeed next after any relation in the same degree of

(s) Co. Lit. 10 b, 13 b; Lit. ss. 2, 5.

(t) Lit. s. 3.

(u) Sects. 1, 5, 6, and see as to the order of ancestral descent, ss. 7, 8.

(x) Co. Lit. 10 b; 2 Blackst. Com. 216.

(y) *Cooper v. France*, 19 L. J. Ch. 313.

the whole blood where the common ancestor is a male, and next after the common ancestor where the ancestor is a female.

V. Descendants cannot take in competition with their immediate ancestor.

Part I. of the Land Transfer Act, 1897 (*z*), does not affect the right of the heir claiming by descent or devise, but expressly empowers him to call for a conveyance from the personal representative in whom the real estate is temporarily vested by the statute for the purpose of administration.

## § 2. DISPOSITION BY WILL.

Land not devisable at common law—except by special custom—uses in equity devisable—until the Statute of Uses.

Statutes of Wills—Statute of Frauds—the Wills Act, 1 Vict. c. 26.

Disposition by will—how far subject to the rules of common law—how far independent of those rules—devises of future estates.

Construction of wills—use of technical terms.

Land not devisable at common law, except by special custom.

The feudal principles of the common law did not admit of a disposition by will of land of freehold tenure. Upon the death of the tenant his heir was originally entitled by the terms of the grant; and though afterwards the title of the heir became liable to be defeated by an alienation of the ancestor during life, it was never defeasible at common law by a devise or testamentary disposition at death. Land was devisable by will in some places by special custom, as lands of gavelkind tenure in the county of Kent, land in the City of London, and in some boroughs; which customs are supposed to be relics of the earlier and præ-feudal common law (*a*).

Uses in equity devisable,—until the Statute of Uses.

Under the system of uses, to be noticed presently, the use or beneficial interest in the land, as recognized in the Court of Chancery, became disposable by will; and a testamentary disposition of land might be effected by conveying it to be held to the uses to be declared by will (*b*). The Statute of Uses, 27 Hen. VIII., by the conversion of uses into legal estates, took away this capacity of testamentary disposition; but, probably for that reason, it was soon followed by the Statute of Wills, conferring a direct testamentary power over the legal estate.

(*z*) 60 & 61 Vict. c. 65.

(*a*) See *ante*, p. 23; Lit. s. 167; Co. Lit. 111 *a*; Hargrave's note (1) on Co. Lit. 111 *b*; *Wild's Case*, 6 Co. 16 *b*;

Robinson on Gavelkind, b. ii. c. v.

(*b*) Lit. ss. 462, 463; Co. Lit. ib.; Perkins, ss. 528, 538; *Clere's Case*, 6 Co. 17 *b*; see *post*, p. 80.



These statutes, 32 Hen. VIII. c. 1 and 34 & 35 Hen. VIII. c. 5, empowered a tenant in fee simple to give, dispose, will or devise to any person or persons by his last will and testament in writing, all his manors, lands, tenements, rents and hereditaments or any of them, "at his own free will and pleasure." The power was expressly restricted, as to lands held by the tenure of knight's service, to the extent of two-thirds of such lands only. But the statute 12 Car. II. c. 24, which afterwards converted the tenure of knight service into socage tenure, abolished this restriction, and rendered all lands of freehold tenure uniformly disposable by will (c).

Statutes of Wills.

The Statute of Frauds, 29 Car. II. c. 3, s. 5, invalidated devises and bequests of any lands or tenements devisable either by force of any statute, or any custom, unless in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and attested and subscribed in the presence of the devisor by three or four credible witnesses. Sect. 6 prescribed the modes by which devises might be revoked (d).

Statute of Frauds, as to the form of wills.

The above enactments were all repealed by the last Wills Act, 1837, 1 Vict. c. 26, s. 2 (except as to wills made before 1838, sect. 34); and this statute requires all gifts by will to be in writing signed by the testator, or by some other person with his authority, made or acknowledged in the presence of and attested by two witnesses who must be present at the same time, and attest the signature of testator in the presence of each other. The Wills Act, 1837, requires that the signature of the testator should be "at the foot or end thereof," and an elaborate gloss has been given for these words by sect. 1 of the Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24). The statutory power of disappointing the expectations of the heir has always been regarded as a qualification upon his common law right to succeed his ancestor in the possession or enjoyment of the estate, and no principle is better established than that the heir shall take all the fee simple lands that are not effectively disposed of by the will (e). This rule formerly placed the heir in a very advantageous position, but the greater freedom of expression now conferred upon testators by sects. 24, 27, and 28 of the Wills Act, 1837, has narrowed its scope, although it has not been abrogated (f).

The Wills Act, 1837.

(c) Co. Lit. 111 b; Hargrave's notes (ib.); see Butler's note to Co. Lit. 271 b, III. 5.

(d) See Hargrave's note (3) to Co. Lit. 111 b.

(e) Note (2) to *Cook v. Gerrard*, 1 Wms. Saund. 172; *Shuldham v. Smith*, 6 Dow. 22; *Cooke v. Stationers' Co.*, 3 My. & K. 262.

(f) See *Windus v. Windus*, 6 De G.

Part I. of the Land Transfer Act, 1897 (*g*), vests the real estate of testators in their personal representatives notwithstanding any testamentary disposition, but this is only for the purposes of the administration of assets, and when those purposes are satisfied the devisee may require the personal representative to transfer the real estate to him.

Disposition by will.

How far subject to the rules of the common law.

How far independent of rules of law.

Devises of future estates.

Construction of wills.

A disposition by will, equally with a disposition by deed, is subject to the general rules of the common law regulating the estates or interests which may be given. A testator can only devise such estates as are known to the law, nor can he alter or take away the legal incidents and qualities of such estates; for instance, he cannot render estates of inheritance inalienable, nor alter the law of inheritance (*h*).

But the power of disposition by will, being derived directly from the statute, is for the most part independent of the restrictions imposed by the peculiar feudal doctrines of the common law, and by the common law forms of conveyance. Devises of freehold estates were operative without livery of seisin, and without attornment, before these formalities were dispensed with by statute (*i*). Devises of freehold estates may be made to take effect *in futuro*, at a future date or upon any specified event, leaving the inheritance in the meantime to descend to the heir; or such devises may be made to take effect in defeasance of and in substitution for preceding devises—although such limitations of estates are contrary to the rules of the common law, which admit no future limitations or substitutions of the tenancy, except by way of remainders (*k*). These future devises are analogous to the springing and shifting uses which became legal limitations under the Statute of Uses, and they are called distinctively *executory* devises (*l*).

The testator, in expressing his intention, is not restricted to the technical language of the common law; nor to any technical rules, beyond the rules of construction which, with some aid

M. & G. 549; 26 L. J. Ch. 185; *Attree v. Attree*, L. R. 11 Eq. 280; 40 L. J. Ch. 192; *Hall v. Hall*, [1892] 1 Ch. 361; 61 L. J. Ch. 289; *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. Ch. 361; *Asten v. Asten*, [1894] 3 Ch. 260; 63 L. J. Ch. 834; *Re Gibbs*, [1907] 1 Ch. 465; 76 L. J. Ch. 238.

(*g*) 60 & 61 Vict. c. 65.

(*h*) *King v. Burchell*, 1 Eden, 424; *Hayes v. Foarde*, 2 W. Bl. 698; *Chapman v. Brown*, 9 Jur. N. S. 995; *Holmes v.*

*Godson*, 8 De G. M. & G. 152; 25 L. J. Ch. 317; *Re Dixon*, [1903] 2 Ch. 458. "Albeit a devise may create an inheritance by other words than a gift can, yet cannot a devise direct an inheritance to descend against the rule of law." Co. Lit. 25 a. See *Pelham Clinton v. New-castle (Duke)*, [1903] A. C. 111; 72 L. J. Ch. 424.

(*i*) Lit. s. 586.

(*k*) See *ante*, p. 33.

(*l*) See *post*, pp 88, 257.

from statutes, have been developed by judicial criticism and authority.

“ It is a rule in the judicial exposition of wills, that technical words, or words of known legal import, are to be considered as having been used in their technical sense, or according to their strict acceptation, unless the context contains a clear indication to the contrary ” (*m*). Hence devises in the terms of common law are construed according to the rules of common law, as in a deed (*n*) ; so devises to uses expressly declared are presumed to be intended to pass estates according to the operation of the Statute of Uses, and are so construed (*o*).

Presumptive  
meaning of  
technical  
terms.

- (*m*) Parke, B., *Winter v. Perratt*, 9 Cl. & F. 606, 671 ; *Roddy v. Fitzgerald*, 6 H. L. C. 823 ; *Van Grutten v. Foxwell*, [1897] A. C. 658 ; 66 L. J. Q. B. 745 ; *Pelham Clinton v. Newcastle (Duke)*, [1903] A. C. 111 ; 72 L. J. Ch. 424.
- (*n*) *Fetherston v. Fetherston*, 3 Cl. & F. 67 ; *Van Grutten v. Foxwell*, [1897] A. C. 658 ; 66 L. J. Ch. 745.
- (*o*) *Baker v. White*, L. R. 20 Eq. 166 ; 44 L. J. Ch. 651 ; *Van Grutten v. Foxwell*, [1897] A. C. 658 ; 66 L. J. Ch. 745. See *post*, p. 95.

## CHAPTER II.

## CUSTOMARY TENURE.

- Section I. Origin and form of customary tenure.
- II. Limitation and transfer of customary estates.
- III. Rights and Remedies incident to customary tenure.
- IV. Extinguishment, Regrant and Enfranchisement.

## SECTION I.

## ORIGIN AND FORM OF CUSTOMARY TENURE.

- Origin of customary tenure—Villenage—services of villenage.
- Form of customary tenure—tenancy at will of the lord—conveyance by surrender and admittance—title by copy of court roll.
- Customary Court—court rolls.
- Customs of manors—general customs—special customs—evidence of customs.
- Land is not grantable by copy, except by custom—custom to grant waste by copy.
- Copyhold and customary freehold—Special forms of customary tenure.
- Customary tenures excepted from 12 Car. II.—application of statutes to customary tenure.

Origin of  
customary  
tenure.

The law of freehold tenure is of universal application, extending over all lands within the realm. Customary tenure exists only in certain places, concurrently with the freehold tenure; and in those places the rights of the freeholder are subjected to the rights of the customary tenant.

The origin of customary tenure is in part matter of conjecture. The task of tracing the system back to its starting point has recently occupied the attention of persons competent to deal with the subject, and they warn us to be careful in the inferences which we may attempt to draw from the materials which have come down to us. Under the manorial system described in the last chapter the territory of the manor was partly held by the lord in demesne, and partly granted out in fee to freehold tenants upon services. Of the demesne lands part were occupied by the lord himself, and part were usually allotted to a class of tenants to whom freehold estates, with the attendant rights of freeholders, were not conceded. This class consisted of persons called *villeins*. The villein was in a servile condition, but was not a slave, for the

Villenage.

terms *villanus* and *servus* occur in passage after passage in Domesday Book as representing distinct personalities. At a later stage, we find apparently two classes, namely, *villeins regardant*, who passed by conveyance as parcel of the manor, and *villeins in gross*, who were not appurtenant to any manor or land. This division into two distinct classes is later than the fourteenth century, when the distinction was apparently used to express the position of the villein from two points of view. The customary tenant whom we call a copyholder is the modern representative of the villein regardant as we know him at a later stage (*a*). Villeins regardant occupied the parcels of land, necessarily allotted to them for dwelling and maintenance, by a tenure called *villinage*, holding at the will of the lord and being removable at his pleasure. In course of time the usage prevailing in the manor in regard to these tenants, under the control and influence of the general law of the land, imposed restrictions upon the lord's absolute right to dispossess them and to the disposal of their persons and services, until by force of custom they ultimately acquired the fixity of tenure, together with the freedom of persons and certainty of service, which appears in modern times in customary tenure. Thus, in relation to freehold tenure these lands were still reputed to be *demesne* lands, being held at the will of the lord and resumable at pleasure; but under the customary tenure they became *tenemental* according to the custom of the manor (*b*).

The services of villinage consisted chiefly of agricultural labour on the lord's demesne lands; and though originally arbitrary in kind and quality as regards the pure villein, they were afterwards regulated by the custom of the manor. In course of time they were, for the most part, commuted, like other services, into money payments or rents, and thus became rent service recoverable by distress (*c*).

Services of villinage.

Customary tenure in point of form bears the distinctive characteristics of its origin. The two principal denominations are copyhold and customary freehold, although the latter is not a distinctive term, as will appear hereafter (*d*). In the former the tenant

Form of customary tenure.

(*a*) See Co. Cop.; Vinogradoff, Villainage in England; Maitland, Domesday Book and Beyond. The last case in which the plaintiff was met by a plea of villinage is apparently *Pigg v. Caley*, (1618) Noy, 27.

(*b*) *Ante*, p. 15; Co. Lit. 116 *a*; Co. Cop. ss. 12, 13, 14, 32; *Brown's Case*,

4 Co. 21 *a*; see *Dearden v. Evans*, 5 M. & W. 11; 8 L. J. Ex. 171; *Winter v. Loveday*, Comyn, 40; 1 L. Raym. 267; 2 Salk. 537.

(*c*) Co. Lit. 116 *a*, 120 *b*; *Laughter v. Humphrey*, Cro. El. 524. See *ante*, p. 16.

(*d*) *Post*, p. 58.

Conveyance  
by surrender  
and admit-  
tance.

is described as holding at the will of the lord, according to the custom of the manor; in the latter, he is described as holding according to the custom of the manor (*e*). The copyholder has no power of disposition by feoffment, grant, or other common law conveyance, but only by surrender and admittance. By custom he may *surrender* his tenancy to the lord *to the use* of any person or persons designated by him; and the lord is bound to *admit* such persons into the tenancy according to the *uses* declared in the surrender so far as they are warranted by the estate of the tenant, and the custom of the manor (*f*). The customary freeholder is distinguished from a freeholder enjoying a common law estate, by reason of the privity of the lord being essential to complete his title, for the freehold of these tenements is in the lord and not in the tenant (*g*).

Title by copy  
of court roll.

The surrender and admittance and all other transactions relating to the title are entered upon the rolls of the court of the manor. Copies of the rolls are delivered by the steward to the tenants as evidence of their title; whence the tenure is called *copyhold*, and the tenants are called *copyholders*, as holding by *copy of court roll* (*h*).

Customary  
Court.

The court in question is the customary branch of the Court Baron, already referred to; in this branch of the court the lord or his steward is the sole judge. The customary court may be held notwithstanding the freehold branch of the Court Baron has become extinguished, and the manor in its legal integrity destroyed, so as to remain only a manor by repute (*i*). The Copyhold Act, 1894 (*k*), sect. 82, enables the lord or steward to hold a customary court, though there be no copyhold tenants of the manor, or though there be no such tenant present at such court.

The court  
rolls.

The court rolls are the property of the lord, but the steward has, during the continuance of his appointment, the right to maintain the custody of them (*l*), for the benefit of persons interested, who may obtain inspection of the parts concerning their interest by mandamus or order of the court upon showing

(*e*) See *Potter v. North*, 1 Wms. Saund. 635, 646, *n* (8).

(*f*) Co. Lit. 58 *b*; *Bullock v. Dibley*, 4 Co. 23 *a*; *Keen v. Kirby*, 1 Mod. 199; 2 Mod. 32; *Doe v. Tomkins*, 11 East, 185; *Doe v. Webber*, 3 Bing. N. C. 922.

(*g*) *Page v. Smith*, 3 Salk. 100; *Bingham v. Woodgate*, 1 R. & M. 32, 750; *Thompson v. Harding*, 1 C. B. 940; 14 L. J. C. P. 268; *Passingham v. Pitty*, 17 C. B. 299; 25 L. J. C. P. 4; *Portland (Duke) v. Hill*, L. R. 2 Eq. 765;

35 L. J. Ch. 239.

(*h*) Co. Lit. 58 *a*; *Doe v. Danvers*, 7 East, 299; *Doe v. Lleuwillin*, 2 Cr. M. & R. 503; 5 L. J. Ex. 84; see *Combe's Case*, 9 Co. 76 *b*.

(*i*) See *ante*, pp. 13, 14, 15; see also *Holroyd v. Breave*, 2 B. & Ald. 473.

(*k*) 57 & 58 Vict. c. 46.

(*l*) *Reg. v. Bishop's Stoke*, 8 Dowl. P. C. 608; *Re Jennings*, [1903] 1 Ch. 906; 72 L. J. Ch. 454. See *Elston v. Wood*, 2 My. & K. 678.

a *primâ facie* title (*m*). The lord should be the party against whom the proceedings are directed, and in proceedings by mandamus the steward has also been included (*n*); and where the lordship is vested in the Crown, the remedy by mandamus is not available (*o*). But persons who challenge the title of the lord to the freehold are not entitled to inspection of the court rolls (*p*).

The court rolls are evidence of the transactions recorded, and may be produced to prove a surrender or admittance or other matter of entry. The copies of court roll delivered by the steward are also admissible in evidence in all cases to prove the title of the tenant. The Stamp Acts require the copy to be stamped, but not the original court roll; and it is no objection to the production of the latter that there is no stamped copy. The copyholder is not obliged to take a copy of the roll of his title (*q*).

The court rolls are not, like the records of a superior court, conclusive upon the parties, but the transaction may be proved, or the roll corrected, by extrinsic evidence (*r*).

The customs of manors regulating customary tenure are so far uniform as to admit of a general custom, or system of rules generally applicable, as common law, to lands of that tenure, but subject to variation by the special customs prevailing in particular manors (*s*).

General  
customs of  
manors.

Courts of justice take judicial notice of the general customs of manors without proof; but special customs must be particularly alleged and proved in legal proceedings (*t*).

General  
custom  
judicially  
noticed.

Special customs of a manor are proved by immemorial uninterrupted usage; subject to the conditions of being certain and reasonable (*u*). The tendency in more recent times is to make

Special  
customs of  
manors.

(*m*) *Rex v. Lucas*, 10 East, 235; *Rex v. Tower*, 4 M. & S. 162; *Hoare v. Wilson*, L. R. 4 Eq. 1; *Minet v. Morgan*, L. R. 11 Eq. 284; *Warrick v. Queen's Coll.*, L. R. 3 Eq. 683; 36 L. J. Ch. 505.

(*n*) See *Rex v. Lucas*, 10 East, 235; *Rogers v. Jones*, 5 Dowl. & R. 484; *Reg. v. Ecans*, 7 Dowl. P. C. 709; 8 L. J. Q. B. 251; *Reg. v. Powell*, 1 Q. B. 352; 10 L. J. Q. B. 148.

(*o*) *Reg. v. Powell*, 1 Q. B. 352; 10 L. J. Q. B. 148.

(*p*) *Talbot v. Villebois*, 3 T. R. at p. 142; *Owen v. Wynn*, 9 Ch. D. 29. See *Rex v. Tower*, 4 M. & S. 162.

(*q*) *Doe v. Hall*, 16 East, 208; *Doe v. Mee*, 4 B. & Ad. 617; *Cole v. Coles*, 6 Ha. 517; affd. 12 L. T. O. S. 237.

(*r*) *Hill v. Wiggett*, 2 Vern. 547;

*Doe v. Culloway*, 6 B. & C. 484; *Doe v. Olley*, 12 A. & E. 481; 9 L. J. Q. B. 379; *Elston v. Wood*, 2 My. & K. 678.

(*s*) *Combes' Case*, 9 Co. 75 a; *Grantham v. Copley*, 2 Wms. Saund. 840, and nn.

(*t*) Co. Lit. 175 b; Bac. Abr. Cop. D.; *Dudfield v. Andrews*, 1 Salk. 184; *Clements v. Scudamore*, 1 P. Wms. 63. An action to have the customs of the manor established by a decree of the court may be maintained by lord or tenant; see *Att.-Gen. v. Barker*, L. R. 7 Ex. 177; 41 L. J. Ex. 57; *Warrick v. Queen's Coll.*, L. R. 6 Ch. 716; *York (Corp.) v. Pilkington*, 1 Atk. 282. Proceedings by tenants in a Crown manor should be by petition of right; see *Reg. v. Powell*, 1 Q. B. 352; 10 L. J. Q. B. 148.

(*u*) Co. Cop. s. 33; *Tyson v. Smith*, 9 A. & E. 406.

every reasonable presumption which will validate a custom evidenced by uninterrupted and long-continued modern usage (*x*).

Customs void  
as unreason-  
able or  
uncertain.

Thus, a custom alleged to be that no copyholder shall use his common until the lord have put in his cattle is void because unreasonable, for the lord by not putting in his cattle might deprive the tenant of his common (*y*). A custom alleged for the lord of a manor to enclose the waste without limit, or to do any other acts destructive of the rights of common in the tenants of the manor, is bad for the same reason (*z*). A custom in a manor for the customary tenants to dig turf for the improvement of their tenements, as occasion requires, was held bad as being unreasonable and uncertain (*a*). But a custom for freeholders and copyholders to get stone from a quarry upon the wastes "to be spent and used on their respective tenements in the said manor, but not elsewhere" was held good (*b*); as was also a custom by copyholders of inheritance, without licence of the lord, to break the surface, and dig and get clay without limit, from and out of their copyhold tenements, with the object of being made into bricks to be afterwards sold by them off the manor, for purposes not connected with the manor, as it was not shown to be destructive of the rights of common, nor did it destroy the estate of the lord (*c*).

Immemorial  
usage.

Immemorial usage originally meant a usage which could not be proved to have had a definite commencement at any time however remote. The time required for deducing title to land, and during which a presumptive title might be rebutted by proof of an adverse possession, was at common law equally indefinite; until by statute 3 Ed. I. c. 29 the date for alleging seisin and deducing title in real actions was fixed at the commencement of the reign of Richard I. (A.D. 1189); and by an equitable extension of this statute the same date was adopted for all rights dependent upon usage (*d*). When first fixed the period of prescription thus required by statute was eighty-six years, but this

(*x*) See *Salisbury (Marq.) v. Gladstone*, 9 H. L. C. 692; 34 L. J. C. P. 222; *Shephard v. Payne*, 16 C. B. N. S. 132; 33 L. J. C. P. 158; *Bryant v. Foot*, L. R. 3 Q. B. 497; 37 L. J. Q. B. 217; *Lawrence v. Hitch*, L. R. 3 Q. B. 521; 37 L. J. Q. B. 209; *L. & N. W. Ry. v. Fobbing Levels Commrs.*, 66 L. J. Q. B. 127.

(*y*) *Mill v. Benet*, Y. B. 2 Hen. IV., fo. 24, pl. 20.

(*z*) *Badger v. Ford*, 3 B. & Ald. 153; *Arlett v. Ellis*, 7 B. & C. 346; *Betts v. Thompson*, L. R. 6 Ch. 732; *Robertson*

*v. Hartopp*, 43 Ch. D. 484; 59 L. J. Ch. 553.

(*a*) *Wilson v. Wiles*, 7 East, 121.

(*b*) *Heath v. Deane*, [1905] 2 Ch. 86; 74 L. J. Ch. 466.

(*c*) *Salisbury (Marq.) v. Gladstone*, 9 H. L. C. 692; 34 L. J. C. P. 222. And see a list of customs collected in n. (13), *Potter v. North*, 1 Wms. Saund., at p. 648.

(*d*) See 1st Rep. of Real Prop. Com-miss. p. 51; and *per* Cockburn, C.J., *Bryant v. Foot*, L. R. 2 Q. B. 161, 179; 37 L. J. Q. B. 217.



period necessarily lengthened until now in theory a custom must have existed for upwards of 700 years in order to be valid. To remedy this state of affairs the judges have assumed the part of legislators, and it is now established that a regular usage of twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding that a custom has existed from time immemorial, and they are directed to return such a verdict unless it appears that the custom has lasted for a less period (*e*).

The Prescription Act, 1832, recites in the preamble that "the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment." This Act has not abrogated the former methods of acquisition and proof (*f*), but has fixed the length of enjoyment, and the evidence necessary to establish the rights acquired under the statute (*g*). The lapse of time now necessary to establish a title to land as against the former owner is regulated by the Real Property Limitation Acts, 1832, 1837, and 1874, unless the title to the land is registered under the Land Transfer Acts, 1875 and 1897, in which case it is regulated by the Land Transfer Act, 1897.

Prescription Act defining immemorial usage.

The special customs of a manor may be proved by entries on the rolls of the court, either of general statements of the custom made by a proper authority (*h*), or by entries of particular dealings with the land in a form recognizing the custom (*i*). An ancient customary of the manor handed down with the court rolls from steward to steward is admissible in evidence (*k*); also evidence of reputation of the custom may be given by the steward or by tenants or other persons acquainted with the custom (*l*). Depositions in former suits on behalf of persons standing in *pari*

Evidence of special customs.

(*e*) *Re x v. Joliffe*, 2 B. & C. 54; *Morgan v. Palmer*, 2 B. & C. 729; *Hammer v. Chance*, 4 De G. J. & S. 626; 34 L. J. Ch. 413.

(*f*) See *Welcome v. Upton*, 6 M. & W. 536; 8 L. J. Ex. 267; *Aynsley v. Glover*, L. R. 10 Ch. 283; 44 L. J. Ch. 523.

(*g*) See *Hammer v. Chance*, 4 De G. J. & S. 626; 34 L. J. Ch. 413; *Mercer v. Denne*, [1905] 2 Ch. 586; 74 L. J. Ch. 723.

(*h*) *Roe v. Parker*, 5 T. R. 26; *Heath v. Deane*, [1905] 2 Ch. 86; 74 L. J. Ch. 466.

(*i*) See *Doe v. Mason*, 3 Wils. 63; *Roe v. Jeffery*, 2 M. & S. 92; *Doe v. Askew*, 10 East, 520; *Muggleton v. Barnett*, 2 H. & N. 653; 27 L. J. Ex. 125; *Johnstone v. Spencer (Earl)*, 30 Ch. D. 581.

(*k*) *Denn v. Spray*, 1 T. R. 466; *Chapman v. Cowlan*, 13 East, 10; *Johnstone v. Spencer (Earl)*, *supra*.

(*l*) *Doe v. Sisson*, 12 East, 62; *Barnes v. Mawson*, 1 M. & S. 77; *Hammer v. Chance*, 4 De G. J. & S. 626. See *Richards v. Bassett*, 10 B. & C. 657; *Deuraven (Earl) v. Llewellyn*, 15 Q. B. 791; 19 L. J. Q. B. 388.

*jure* are admissible (*m*). The customs of one manor are no evidence of those of another, even of a neighbouring manor; but where it is shown that adjacent manors are governed by the same custom, the incidents of tenure obtaining in one manor are admissible to show the extent of the custom existing in another manor (*n*).

Land cannot be granted by copy except by custom.

Land cannot now be granted upon customary or copyhold tenure, unless it has been so granted or grantable by immemorial custom; because custom alone sanctions this form of tenure (*o*). Copyholds have been created by statute in some few instances (*p*).

Special custom to grant waste by copy.

By special custom in some manors the lord may grant out portions of the waste to hold by the customary tenure of the manor; such land having been by the custom grantable, though not so granted, from time immemorial (*q*). But the lord cannot exercise such right to the prejudice of the rights of common of the tenants of the manor without the consent of the homage (*r*). By section 81 of the Copyhold Act, 1894, the previous consent of the Board of Agriculture must be obtained to effectuate a valid grant.

The distinction between the two principal kinds of customary tenure, namely, copyhold and customary freehold, is explained by reference to the two kinds of ancient villenage from which modern customary tenure is derived.

Pure villenage.

*Pure villenage* was the tenure of villeins by birth, whose persons and services were at the arbitrary disposal of the lord and who originally held their lands absolutely at his will. These tenants became the modern *copyholders*, who still hold nominally at the will of the lord.

Villein socage.

*Villein socage* was a privileged species of villenage in which the services were certain and due only by tenure, and not by reason

(*m*) *Freeman v. Phillipps*, 4 M. & S. 486.

(*n*) *Somerset (Duke) v. France*, 1 Strange, 654; *Louther v. Raw*, Fort. 44; *Rovee v. Brenton*, 8 B. & C. 737; *Anglesey (Marq.) v. Hatherton (Lord)*, 10 M. & W. 218; 12 L. J. Ex. 57. See a variety of special customs collected 2 Watkins, Copyholder, and in Blount's Ancient Tenures, ed. Beckwith. In the case of usages which do not require to be established by immemorial usage, e.g., customs of a trade (see *Dalby v. Hirst*, 1 Brod. & B. 224; *Seymour v. Bridge*, 14 Q. B. D. 460), evidence of usages in other places, or in similar trades, may be given in evidence to support the custom set up: *Noble v. Kennoway*, 2

Dougl. 510; *Fleet v. Murton*, L. R. 7 Q. B. 126.

(*o*) Co. Lit. 58 b; *Murrel v. Smith*, 4 Co. 24 b; *Revell v. Joddrell*, 2 T. R. 415; *Everest v. Glyn*, 6 Taunt. 425.

(*p*) See *Evans v. Upsher*, 16 M. & W. 675; 16 L. J. Ex. 185; *Scriven*, 16 n. (t).

(*q*) *Northwick (Lord) v. Stanway*, 3 B. & P. 346; *R. v. Wilby*, 2 M. & S. 504; *R. v. Horncchurch*, 2 B. & Ald. 189; *Doe v. Davidson*, 2 M. & S. 175; *Hodgson v. Hooper*, 3 E. & E. 149; 29 L. J. Q. B. 222.

(*r*) See *ante*, p. 55, n. (*u*); *Warrick v. Queen's Coll.*, L. R. 6 Ch. 716; *Betts v. Thompson*, L. R. 6 Ch. 732; *Ramsey v. Cruddas*, [1893] 1 Q. B. 228; 62 L. J. Q. B. 269.

of personal condition. It is said to have arisen from freemen taking grants of portions of the lord's demesne to hold for estates, freehold as to quantity and not at will only, but upon the same services as were rendered in villenage. This tenure became known as *customary freehold*; but the freehold title remains in the lord, and it is in other respects subject to the general law of copyhold (s).

The latter kind of tenure is said to be almost peculiar to manors of ancient demesne; whence the description of tenants in ancient demesne is sometimes used to designate these customary freeholders (t).

Tenants in  
ancient  
demesne.

Some special forms of customary tenure occur in several places in England, which come under the same consideration with the above, inasmuch as the freehold title is in the lord and they are regulated by the custom of the manor, but which have peculiar incidents and qualities differing from ordinary copyhold.

Special forms  
of customary  
tenure.

There is a species of customary freehold peculiar to the North of England, known as *tenant right*, in which the estate of the tenant passes by a common law conveyance and admittance by the lord (u).

Tenant right

There is also a species of customary tenure in the North of England known as *cattle gates*, which are customary estates of inheritance held of the manor by certain fines, rents, and dues, and passing by a customary deed presented at the lord's court and followed by admission (x).

Cattle gates.

Customary tenures are excepted, by the general description of tenure by copy of court roll, from the operation of the statute 12 Car. II., which reduced other tenures to the form of common socage (y).

Customary  
tenures ex-  
cepted from,  
12 Car. II.

It is a general rule, as to the application of statutes to land of copyhold tenure, that statutes which would operate in prejudice of those interests of the lord or tenant which are peculiar to the tenure do not extend to copyholds, unless expressly mentioned;

Application  
of statutes to  
copyholds.

(s) *Ante*, p. 53.

(t) *Ante*, p. 17. They are so termed in 5 & 6 W. & M. c. 24.

(u) *Somerset (Duke) v. France*, Strange, 654; *Lowther v. Raw*, Fort. 44; *Doe v. Huntingdon*, 4 East, 271; *Doe v. Davidson*, 2 M. & S. 175; *Burrell v. Dodd*, 3 B. & P. 378. See *Bingham v. Woodgate*, 1 R. & My. 32, where the custom required a conveyance as well as a surrender, and the freehold was held

to be in the tenant. And see instances of like customary freeholds in Kent, *Thompson v. Hardinge*, 1 C. B. 940; at Porchester, *Perryman's Case*, 5 Co. 84 a; in Northumberland, *Brown v. Rawlins*, 7 East, 409.

(x) *Rigg v. Lonsdale (Earl)*, 1 H. & N. 923; *Ewart v. Graham*, 7 H. L. C. 331; 29 L. J. Ex. 88.

(y) Sect. 7; see *ante*, p. 20; *Doe v. Huntingdon*, 4 East, 271, 287.

but statutes which do not prejudice the interests of lord or tenant may include copyholds by general words, without expressly mentioning them (z).

## SECTION II. THE LIMITATION AND TRANSFER OF ESTATES OF CUSTOMARY TENURE.

The customary estate—limitation of uses of surrender—construction of limitations.

Fee simple conditional—estate tail by special custom—modes of barring estate tail.

Future and contingent uses—powers of appointing uses—use limited to surrenderor.

Lease for years—at common law—under surrender to use—freehold estate, seisin, etc., applied to copyholds.

Devise by surrender to use of will—devise without surrender—the Wills Act, 1 Vict. c. 26.

Deseent in customary tenure.

The custom-  
ary estate.

The power of the lord to grant or admit to land to be held by copy is regulated strictly by the custom of the manor. The estate sanctioned by custom is in some cases an estate of inheritance in fee simple (*a*), or for life or lives (*b*), or for years (*c*), and in the case of copyholds for life or lives or for years there may also exist a right to obtain a renewal upon failure of the lives, or the expiration of the term (*d*). A grant for lives in some manors imports by custom that the persons named take in succession (*e*).

Any estate may be limited which does not exceed in duration that authorized by the custom. Thus a custom authorizing a grant in fee simple will authorize the grant of an estate tail (*f*); but for this a special custom is necessary (*g*), failing which, the tenant will take a fee simple conditional (*h*). So where a custom authorizes the grant of an estate of inheritance, a grant for life or lives or for years will be good (*i*). And a custom admitting

(z) *Heydon's Case*, 3 Co. 7 *a*; see *Doe v. Bottrill*, 5 B. & Ad. 131; 2 L. J. K. B. 158. See a list of statutes construed according to this rule, Scriven, Cop. 81—90.

(*a*) *Wade v. Bache*, 1 Wms. Saund. 160.

(*b*) *Somerset (Duke) v. France*, 1 Stra. 654; *Lowther v. Raw*, Fort. 44.

(*c*) *Page's Case*, Cro. Jac. 671; *Bath (Earl) v. Abney*, 1 Burr. 212.

(*d*) *Walker v. Abingdon (Lord)*, 10

L. J. N. S. Ch. 289. And see cases cited in two preceding notes.

(*e*) *Podger's Case*, 9 Co. 104 *a*; *Smartle v. Penhallow*, 2 L. Raym. 994; *Doe v. Goddard*, 1 B. & C. 522.

(*f*) *Stanton v. Barnes*, Cro. El. 373.

(*g*) *Gravenor v. Rake*, Cro. El. 307.

(*h*) *Doe v. Clark*, 1 B. & Ald. 458; *Doe v. Simpson*, 3 Man. & G. 929.

(*i*) *Brown's Case*, 4 Co. 21 *a*; *Gravenor v. Todd*, 4 Co. 23 *a*.

of an estate for three lives impliedly admits a limitation for one (*j*). A custom admitting an estate for life admits of an estate *durante viduitate* (*k*). And it seems that a custom to grant for years would warrant a grant for a term of years, if the grantee should so long live (*l*).

The copyholder may, in general, surrender to the use of another for his own estate and interest, or any less estate within the custom (*m*). The surrender does not pass the estate of the surrenderor to the lord (*n*), and until admittance the surrenderee takes no estate in the land (*o*), but after admittance his title relates back to the date of surrender against all persons but the lord (*p*). Thus, the wife's claim to freebench, which was defeasible at the will of the husband, and in this respect differed from the right to dower at the common law, was defeated by the admittance of the surrenderee after the death of the husband (*q*). So, too, where the surrenderor makes a surrender to uses which did not exhaust the estate vested in him, the reversion is in the surrenderor and not in the lord (*r*). Accordingly, if a copyholder in fee surrendered to the use of his will (which was generally necessary prior to the statutory amendment of the law hereafter mentioned) and devised for life, his heir claiming by descent took the reversion (*s*). A surrender does not operate by way of estoppel against the surrenderor, or those claiming under him (*t*); or against the lord (*u*), who is a mere instrument to pass the estate (*x*). In some manors the surrenderee must come in within a limited time and claim admittance (*y*). Where copyholds of inheritance are surrendered to the use of a person for a particular estate with limitations in remainder to other persons, the admission of the tenant of the particular estate is the admission of all in remainder, whether the particular estate be an estate of freehold or for a term of years (*z*).

Limitation of the uses of surrenders.

(*j*) *Smartle v. Penhallow*, 2 L. Raym. 994.

(*k*) *Down v. Hopkins*, 4 Co. 29 *b*.

(*l*) 1 Watk. Cop. by Coventry, 66, n.

(*m*) *Bullock v. Dibley*, 4 Co. 23 *a*; *Gravenor v. Todd*, 4 Co. 23 *a*; and the cases cited *ante*, p. 54.

(*n*) *Fitch v. Stuckley*, 4 Co. 23 *a*; *Rex v. Mildmay*, 5 B. & Ad. 254; *Rex v. Oundle*, 1 A. & E. 283; 3 L. J. K. B. 117.

(*o*) *Roe v. Hicks*, 2 Wils. 13, 16; *Doe v. Tufield*, 11 East, 246; *Rex v. Mildmay*, 5 B. & Ad. 254.

(*p*) *Holdfast v. Clapham*, 1 T. R. 600. See *Doe v. Vernon*, 7 East, 8;

*Horlock v. Priestley*, 2 Sim. 75.

(*q*) *Benson v. Scot*, 3 Lev. 385. See *Wood v. Lambirth*, 1 Phill. 8.

(*r*) *Bunting v. Lepingwell*, 4 Co. 29 *a*; *Roe v. Griffiths*, 1 W. Bl. 605.

(*s*) *Bullen v. Grant*, Cro. El. 148.

(*t*) *Goodtitle v. Morse*, 2 T. R. 365; *Doe v. Tomkins*, 11 East, 185; *Doe v. Wilson*, 4 B. & Ald. 303. See *Doe v. Tufield*, 11 East, 246.

(*u*) *Rex v. Mildmay*, 5 B. & Ad. 254.

(*x*) *Westwick v. Weyer*, 4 Co. 28 *a*.

(*y*) *Doe v. Coombes*, 6 Q. B. 535; 12 L. J. Q. B. 36.

(*z*) *Fitch v. Stuckley*, 4 Co. 23 *a*; *Batmore v. Graves*, 1 Vent. 260; *Roe*

Construction  
of limitations.

The limitation of the uses of a surrender is generally framed in the same technical terms, and is subject to the same rules of construction, as the limitation of estates in a conveyance of the freehold at common law (*a*). Thus, a surrender to the use of a person in general terms, without words of inheritance, passes an estate for life only, unless there be a special custom by which a fee simple may be created without the word "heirs," as by such words as "*sibi et suis*," "*sibi et assignatis*," or the like (*b*).

The rule in *Shelley's* case applies to the limitations of copyholds; and if a grant or surrender be made to the use of a person for life with a remainder to his heirs, the limitation to the heirs is referred to the estate of the ancestor, and enlarges it to an inheritance (*c*).

Fee simple  
conditional,  
or estates  
tail.

Where the custom admits of an estate by copy to a person and his heirs, it also admits of a grant or surrender to a person and the heirs of his body, or the heirs male of his body, or the like special lines of heirs; the construction and effect of which limitations depend upon the custom of the manor. The construction of the common law was generally, though not universally, followed in the manorial courts; and as the statute *De donis* did not apply to copyholds, these limitations, in general, retain the construction of fees simple conditional at the present day (*d*). In those manors, however, in which the construction of the common law was not followed, such limitations were taken to confer successive estates upon the issue designated in the grant, *per formam doni*, according to the primitive construction or, at least, intention of such grants, which was restored and rendered effectual, as to the freehold, by the statute *De donis*. Hence in some manors by special custom limitations "to the heirs of the body," etc., create estates tail, analogous to estates tail of freehold since the statute (*e*).

Proof of  
custom of  
entail.

Amongst the proofs of such a special custom of entail are:—"If a remainder have been limited over such estates and enjoyed; or if the issues in tail have avoided the alienation of the ancestor; or if they have recovered the same in writs of *formedon* in the discender"; or if the tenant be permitted by the custom to alien before issue born, in prejudice to the right of reverter; all which incidents are inconsistent with a fee simple conditional. On the other hand, where such remainders are not allowed, or the power

v. *Loreless*, 2 B. & Ald. 453; *Doe v. Thomas*, 3 Man. & G. 815; 11 L. J. C. P. 124.

(a) *Per Holt*, Ch. J., *Idle v. Cook*, 1 P. Wms. 77; *Hardwicke, C., Rigden v. Valliere*, 2 Ves. Sen. 357.

(b) *Bunting v. Lepingwell*, 4 Co. 29 a.

(c) *Doe v. Wilson*, 4 B. & Ald. 303.

(d) *Heydon's Case*, 3 Co. 7 a; *Gravenor*

v. *Todd*, 4 Co. 23 a; *Doe v. Simpson*, 3 Man. & G. 929. See *ante*, pp. 24, 25.

(e) *Heydon's Case*, 3 Co. 7 a.

of alienation originates with the birth of issue, the estate is of the nature of a fee simple conditional (*f*).

An estate tail in copyhold might be barred, according to the custom:—by a recovery in the customary court of the manor; by forfeiture to the lord and regrant; or, in the absence of any other customary mode of barring it, it might be barred by a surrender (*g*). And in some manors there were concurrent customs giving a choice to the party seeking to bar those in remainder (*h*). The Fines and Recoveries Act, 1833, provides that the legal estate tail in copyholds shall be barred by surrender and an equitable estate tail therein by deed entered on the court rolls of the manor (*i*).

Modes of  
barring  
estates tail.

The limitation of the uses of a surrender is not restricted by the rules concerning the seisin which prevail in freehold tenure, for the freehold remains vested in the lord. Hence the use may, in general, be limited for an estate to commence *in futuro*, though freehold in quantity; and such estate may be limited to arise upon conditional terms or contingent events. So, a contingent remainder may be limited without a prior vested estate of freehold; and though a contingent remainder would fail, if it had not become vested at the time appointed by the terms of limitation for taking effect in possession, yet it would not be destroyed by the premature determination of the prior estate, as by surrender or forfeiture, for remainders in copyholds are not thereby accelerated as in freeholds. So, the use may be limited in defeasance or substitution of prior uses. The lord is bound to admit according to uses limited in the above forms, though such limitations are not admissible in a conveyance operating at common law (*k*).

Uses limited  
*in futuro* and  
upon con-  
tingency.

Contingent  
remainder.

The surrender may also be made to such uses as some other person shall appoint, under a power or authority given to him for that purpose. The lord is not bound, without a special custom in the manor, to accept a surrender containing a power of appointment of the uses; but, if he does accept such a surrender, he is bound to recognize and admit the appointee (*l*). The appointees of uses under the power take their title from the surrender and not from the appointor, and it is not necessary

Uses  
appointed  
under powers.

(*f*) Co. Lit. 60 *b*; Scriven Cop. 55, 4th ed.

(*g*) *Grantham v. Copley*, 2 Wms. Saund. 840, and notes.

(*h*) *Doe v. Davenport*, 7 Taunt. 674; *Doe v. Ossingbrooke*, 2 Bing. 70.

(*i*) *Reg v. Ingleton*, 8 Dowl. P. C. 693.

(*k*) *Wade v. Buche*, 1 Wms. Saund. 160; *Podger's Case*, 9 Co. 107 *a*; *Rex v. Oundle*, 1 A. & E. 283; *Boddington v. Abernethy*, 5 B. & C. 776.

(*l*) *Boddington v. Abernethy*, 5 B. & C. 776; *Flack v. Downing College*, 13 C. B. 945; 22 L. J. C. P. 220.

that the latter should be admitted in order to give validity to the uses, although he take an estate until and in default of appointment (*m*).

Use limited to  
surrenderor.

As the conveyance operates through the medium of the lord by surrender to him and admittance of the new tenant, a copyholder is thus enabled to make a surrender to his own use and take an admittance of a new estate; so he may surrender to the use of his wife;—limitations which were void of effect at common law (*n*).

Lease for  
years,—at  
common law.

By the general custom of copyholds a tenant may make a lease for one year to take effect at common law without a surrender and without the licence of the lord; and by special custom or by licence of the lord he may make such a lease for a longer term. The lessee under such lease has a common law and not a copyhold interest; he is tenant to the copyholder only, and not to the lord, and does not require admittance. The copyholder may also lease by a surrender to the use of the lessee for any term of years without licence or special custom, under his general power of disposition of the copyhold; and the surrenderee must then be admitted and becomes tenant by copy to the lord and not to the copyholder (*o*). A lease made at common law against the custom and without licence is good against all parties except the lord; as against him it is ground of forfeiture, which he may enforce or waive (*p*).

Lease by  
surrender.

Freehold,  
seisin, etc.,  
applied to  
copyholds.

The term *freehold* as expressing the quantity or duration of estates admissible in freehold tenure, namely, estates for life and of inheritance, is applied by analogy to estates of customary tenure and distinguishes such estates from leasehold or terms of years; but the *freehold* as expressing the tenure of the land is in the lord, and not in the customary tenant (*q*). So the possession of a copyholder for an estate freehold in quantity is commonly termed the customary *seisin*, and the copyholder is said to be *seised* of such estate; though the terms are strictly applicable only to the possession of the freehold tenant. But there can be no *disseisin*, technically so called, with its peculiar consequences, of a customary tenancy (*r*).

(*m*) *Rev. v. Oundle*, 1 A. & E. 283; 3 L. J. K. B. 117; *Glass v. Richardson*, 2 D. M. & G. 658; 22 L. J. Ch. 105.

(*n*) *Bunting v. Lepingwell*, 4 Co. 29 b; *Brooks v. Brooks*, Cro. Jac. 434. See *ante*, pp. 36, 37.

(*o*) Co. Cop. s. 51; *Melwich v. Suter*, 4 Co. 26 a; *Bath (Earl) v. Abney*, 1

Burr. 206; *Doe v. Luffkin*, 4 East, 221; *Luffkin v. Nunn*, 11 Ves. 170.

(*p*) *East v. Harding*, Cro. El. 498; *Doe v. Tresidder*, 1 Q. B. 416; 10 L. J. Q. B. 160; *Doe v. Bousfield*, 6 Q. B. 492; See *Doe v. Pyke*, 5 M. & S. 146.

(*q*) See *ante*, p. 53.

(*r*) Co. Cop. ss. 14–17; *Brown's*



By general custom a copyholder in fee might surrender to the use of his will, and by his will declare and limit the uses. The land then passed by the combined effect of the surrender and will, as if the uses declared by the will had been inserted in the surrender; and the appointee or devisee, upon the death of the testator, was in the position of a surrenderee. Under the will a further power of appointing the uses might be created (s).

Devise by surrender to the use of will.

Copyhold land was thus devisable, independently of the statutes of wills which did not extend to copyholds, and without any other formalities than those, if any, prescribed by the terms of the surrender for the appointment of the uses (t).

By special custom a copyholder might devise without a surrender to the use of his will (u). In the absence of such custom, a will, without the surrender, was void of effect at law. The Court of Chancery, however, would compel the heir to surrender, in support of wills devising to a wife, child, or creditors, which would otherwise have failed for want of the surrender (x). It seems that there could not be a special custom against surrendering to the use of a will, because it is implied in the general power to surrender (y).

Devise by special custom without surrender.

Surrender supplied in Chancery.

The statute 55 Geo. III. c. 192, commonly called Preston's Act, dispensed with the necessity of a surrender to the use of a will; and by the recent Wills Act, 1837 (repealing the above Act, see sect. 2), the general power thereby given to dispose of real estate by will is extended "to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or may not have been admitted thereto, or notwithstanding that the same in consequence of any special custom could not have been disposed of by will, if this Act had not been made" (z). The Act provides for the payment of the stamps, fees, and fines which would have been payable on the admittance of the testator and surrender by him (sect. 4). And if the land could not have been devised except under the Act, the same fines and dues are to be payable to the lord as upon a descent (sect. 5). The will must be signed and

Power to dispose by will without surrender and without admittance.

*Case*, 4 Co. 21 a; *Prebble v. Bughurst*, 1 Swanst. 309, 580; *Kite and Queinton's Case*, 4 Co. 25 a. See ante, p. 40.

(s) *Fitch v. Stuckley*, 4 Co. 23 a; *Holder v. Preston*, 2 Wils. 400; *Glass v. Richardson*, 2 De G. M. & G. 658; 22 L. J. Ch. 105.

(t) *Devenish v. Baines*, Prec. Ch. 3; *Pike v. White*, 3 Bro. C. C. 286; *Church v. Mundy*, 15 Ves. 403.

(u) See *Devenish v. Baines*, Prec. Ch. 3.

(x) *Lloyd v. Burton*, 2 Bro. P. C. 281; *Marston v. Gowan*, 3 Bro. C. C. 170; *Holmes v. Coghill*, 12 Ves. 216; *Bisby v. Eley*, 2 Bro. C. C. 325.

(y) *Doe v. Llewellyn*, 2 C. M. & R. 503.

(z) *Garland v. Mead*, L. R. 6 Q. B. 441; 40 L. J. Q. B. 179.

attested in the manner required by the Act (sect. 9), and is to be entered upon the court rolls (sect. 5).

Descent in  
customary  
tenure.

The common law rules of descent, as amended by the Inheritance Act, 1833, apply to inheritances of customary and copyhold tenure, subject to the variations of special customs (*a*). In the case of equitable interests, including those arising under implied or resulting trusts, an estate of inheritance will descend upon the customary heir and not upon the common law heir, as is the case if the trust be executory (*b*). Sect. 1 of the Land Transfer Act, 1897, does not apply to "land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant" (*c*). The exception does not extend to equitable estates in copyholds or customary freehold, and these estates, if in fee, vest in the personal representative, but only for the purposes of administration (*d*). By sect. 88 of the Copyhold Act, 1894, which reproduces an earlier statute, the older law relative to the descent of trust and mortgage estates in copyholds is restored, and these devolve upon the customary heir unless there is a testamentary disposition to the personal representatives (*e*). The title of the customary heir is complete without admittance (*f*).

### SECTION III. RIGHTS AND REMEDIES INCIDENT TO CUSTOMARY TENURE.

Rights of copyholder.

Remedies of copyholder—trespass—ejectment—mandamus to compel admittance—bill in Chancery.

Rights of lord—seizure to compel admittance—suit to ascertain boundaries.

Fines on admittance, etc.—fees to steward.

Fealty and services of customary tenure.

Escheat—forfeiture—waiver of forfeiture.

Rights of  
copyholder  
incident to  
tenure or  
possession.

The customary tenant has all the rights of enjoyment incident to the mere possession; but the rights of property, subject to the

(*a*) 3 & 4 Will. IV., c. 106, s. 1; *Brown's Case*, 4 Co. 21 *a*; *Locke v. Southwood*, 3 Cl. & F. 721; *Muggleton v. Barnett*, 2 H. & N. 653; 27 L. J. Ex. 125; *Nunson v. Barnes*, L. R. 7 Eq. 250. See *Mallinson v. Siddle*, 39 L. J. Ch. 426.

(*b*) *Re Hudson*, [1908] 1 Ch. 655; 77 L. J. Ch. 305.

(*c*) 60 & 61 Vict. c. 65, s. 1, sub-s. 4.

(*d*) *Re Somerville and Turner's*

*Contract*, [1903] 2 Ch. 583; 72 L. J. Ch. 727.

(*e*) *Re Mills*, 37 Ch. D. 312; 57 L. J. Ch. 466; on appeal 40 Ch. D. 14. See *Braybrooke (Lord) v. Inskip*, 8 Ves. 417; Tnd. L. C. Conv. 322.

(*f*) *Doe v. Brightwen*, 10 East, 583; *Wilson v. Allen*, 1 J. & W. 611; *Barnett v. Guildford (Earl)*, 11 Ex. 19; 24 L. J. Ex. 281.

possessory rights of the tenant, remain in the lord. A special custom, however, in some manors authorizes the tenants to exercise proprietary rights, absolute or qualified, in respect of minerals or timber within their tenements (*a*). The tenants are also entitled, as of right, to take estovers or botes, that is timber for the repair of their tenements or farming implements. This is a right compensatory of their obligation to uphold and repair their tenements, and to perform services in husbandry, and is strictly bounded by the necessity (*b*). In the absence of custom, any act of waste by the tenant is a forfeiture of his estate, giving to the lord a right to resume possession (*c*); nor may the tenant cut timber (*d*), nor open or work mines (*e*). On the other hand, the tenant may, in respect of his possession, maintain an action against the lord, if he enters to cut timber (*f*), or work minerals (*g*). And being himself unable to do these acts, it follows that neither the tenant nor the lord can confer greater rights upon others than each possesses (*h*). In an action against a stranger in respect of a wrongful act, the lord, as freeholder, and the tenant, in respect of his possession, may each maintain an action (*i*).

The copyholder's remedy for the recovery of his tenement was originally by a plaint in the nature of a real action in the customary court of the manor; he had no real action in the superior courts of common law, because he had no freehold title (*k*). He might maintain trespass, in right of his possession, in the common law courts, and even against the lord (*l*); he might also maintain ejectment through his lessee, founded on his power of giving a common law lease, and the latter form of action became the

Remedies of copyholder.

Trespass.

Ejectment.

(*a*) *Denn v. Johnson*, 10 East, 267; *Curtis v. Daniel*, 10 East, 273; *Salisbury (Marq.) v. Gladstone*, 9 H. L. C. 692; 34 L. J. C. P. 222; *Hammer v. Chance*, 4 De G. J. & S. 626; 34 L. J. Ch. 413.

(*b*) *Heydon v. Smith*, 13 Co. 67; *Whitechurch v. Holworthy*, 4 M. & S. 340; *Bailey v. Sterens*, 12 C. B. N. S. 91; 31 L. J. C. P. 226.

(*c*) *Peachy v. Somerset (Duke)*, 1 Stra. 477; *Doe v. Clements*, 2 M. & S. 68; *Doe v. Burlington (Earl)*, 5 B. & Ad. 507; *Reg. v. Dare*, 2 F. & F. 355.

(*d*) *Peachy v. Somerset (Duke)*, 1 Stra. 477; *Mardiner v. Elliott*, 2 T. R. 746; *Doe v. Wilson*, 11 East, 56. See *Blackett v. Loves*, 2 M. & S. 494.

(*e*) *Winchester (Bp.) v. Knight*, 1 P. Wms. 406; *Portland (Duke) v. Hill*, L. R. 2 Eq. 765. See *Dearden v. Evans*,

5 M. & W. 11; *Cox v. Glue*, 5 C. B. 533; 17 L. J. C. P. 162.

(*f*) *Whitechurch v. Holworthy*, 4 M. & S. 340; 19 Ves. 213.

(*g*) *Bourne v. Taylor*, 10 East, 189; *Eardley v. Granville (Earl)*, 3 Ch. D. 826; 45 L. J. Ch. 669. See *Att.-Gen. v. Tomline*, 5 Ch. D. 750; 46 L. J. Ch. 654.

(*h*) *Heydon v. Smith*, 13 Co. 67; *Hext v. Gill*, L. R. 7 Ch. 699; 41 L. J. Ch. 761. See *Keyse v. Powell*, 2 E. & B. 132; 22 L. J. Q. B. 305.

(*i*) *Lewis v. Branthwaite*, 2 B. & Ad. 437; *Cox v. Glue*, 5 C. B. 533; 17 L. J. C. P. 162. As to the measure of damage, see *Heydon v. Smith*, 13 Co. 67; *Att.-Gen. v. Tomline*, 15 Ch. D. 150.

(*k*) Lit. s. 76; Co. Cop. s. 51.

(*l*) See cases cited, *supra*, notes (*f*) and (*g*).

ordinary mode of recovering copyhold lands (*m*). Now all plaints in the nature of real actions, in common with real actions at common law, are taken away by the 3 & 4 Will. IV. c. 27, s. 36 (*n*); and the only remedy is by action of ejectment.

Proceedings  
to compel  
lord to admit,  
accept sur-  
render, etc.

A mandamus issues to the lord to compel him to accept a surrender and admit a new tenant (*o*). The lord is a necessary party against whom the writ should issue, and it is consequently an inappropriate remedy where the Crown is lord of the manor (*p*). The writ issues upon proof of a *primâ facie* title, and where two persons claim under adverse titles, the court will require the admittance of both (*q*). The Court of Chancery exercised a concurrent jurisdiction to compel admission (*r*), and this jurisdiction is now vested in the High Court (*s*). A mandamus, which it is in the discretion of the court to refuse, will not issue in a doubtful case (*t*).

Rights of the  
lord.

Seizure  
*quousque* to  
compel  
admittance.

The lord is entitled to have a tenant upon the rolls (*u*), and may by general custom seize and retain the tenement until the tenant comes in and is admitted. This seizure *quousque* is in the nature of process to compel admittance, but the right can only be exercised after three proclamations made at three consecutive courts (*x*). By special custom the lord may be entitled to seize absolutely for want of a tenant, as he may for a forfeiture (*y*).

Where the lord is in possession under a seizure lawfully made, the tenant must take proceedings to recover the tenement within the period allowed by the Statute of Limitations (*z*).

Suit in equity  
to ascertain  
boundaries.

The lord has no remedy in equity merely to compel admittance (*a*); but if he cannot exercise his legal remedy of

(*m*) *Melwich v. Luter*, 4 Co. 26 *a*.

(*n*) See *ante*, p. 42.

(*o*) *Rex v. Boughey*, 1 B. & C. 565; *Rex v. Brewers Co.*, 3 B. & C. 172. See *Rex v. Rigge*, 1 B. & Ald. 550.

(*p*) *Reg. v. Powell*, 1 Q. B. 352; 10 L. J. Q. B. 148.

(*q*) *Rex v. Brewers Co.*, 3 B. & C. 172; *Rex v. Herham*, 5 A. & E. 559; 6 L. J. K. B. 33; *Rex v. Ham*, 8 L. J. N. S. Q. B. 265.

(*r*) *Dimes v. Grand Junction Canal*, 3 H. L. C. 794; *Andrews v. Hulse*, 4 K. & J. 392; 27 L. J. Ch. 655. See *Williams v. Lonsdale (Lord)*, 3 Ves. 752; *Widdowson v. Harrington (Earl)*, 1 J. & W. 532; *Walters v. Webb*, L. R. 5 Ch. 531; 39 L. J. Ch. 677.

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

(*t*) *Reg. v. Garland*, L. R. 5 Q. B. 269; 39 L. J. Q. B. 86.

(*u*) *Ereringham v. Iratt*, L. R. 8 Q. B. 388; 42 L. J. Q. B. 203; *Hall v. Bromley*, 35 Ch. D. 642; 56 L. J. Ch. 722; *Garland v. Mead*, L. R. 6 Q. B. 441; 40 L. J. Q. B. 179.

(*x*) *Doe v. Hellier*, 3 T. R. 162; *Doe v. Trueman*, 1 B. & Ad. 736; *Doe v. Muscott*, 12 M. & W. 832; 14 L. J. Ex. 185; *Eccles. Commrs. v. Parr*, [1894] 2 Q. B. 420; 63 L. J. Q. B. 784; *Beighton v. Beighton*, 64 L. J. Ch. 796. See *Doe v. Coombes*, 6 Q. B. 535; 14 L. J. Q. B. 37.

(*y*) *Doe v. Hellier*, 3 T. R. 162.

(*z*) *Walters v. Webb*, L. R. 5 Ch. 531; 39 L. J. Ch. 677; *Eccles. Commrs. v. Parr*, [1894] 2 Q. B. 420; 63 L. J. Q. B. 784.

(*a*) *Searle v. Cooke*, 32 Ch. D. 519; 59 L. J. Ch. 259. See *Durham (Bp.) v. Ripon*, 4 L. J. O. S. Ch. 32.

seizure by reason of confusion of the boundaries of the copyhold tenement, he may maintain an action to ascertain and set out the boundaries, and, if that should be impossible, to have lands of equal value set out in substitution (*b*).

By general custom the lord is entitled to a fine upon the admission of a tenant. Where copyholds stand limited to one for life or for years with limitations over to other persons by way of remainder, the admission of the tenant of the particular estate is the admittance of all entitled in remainder, and no fine is payable by them unless there be a special custom to that effect (*c*). The amount of the fine may be fixed by the custom of the manor; if it is not so fixed, it is arbitrary, but subject to the condition of reasonableness, which is satisfied if it does not exceed two years' improved yearly value of the land in respect of one life (*d*). Where two or more persons claim to be admitted, whether they are to enjoy the property contemporaneously or in succession, the fine is assessed on the principle that the first person pays a full fine, the second one half of the full fine, and the next one quarter of the full fine, and so on in a descending scale (*e*). Coparceners, however, make but one heir, and in their case it would seem that only one fine is payable (*f*). The restriction of reasonableness only applies when the lord is bound to admit, but not upon a voluntary grant, as after a forfeiture, in which case the fine is purely arbitrary (*g*). Where a copyhold tenement is broken up into parcels, or otherwise severed in interest, each parcel becomes a new tenement, and a fine is payable in respect of each at any rate until the same become reunited in one person (*h*). And in those manors where a tenant on the rolls is entitled to be admitted without paying a fine, or upon payment of a reduced fine, he is not entitled to treat contemporaneous surrenders of several tenements as independent conveyances and claim admission to one tenement

Fine upon admission.

(*b*) *Clayton v. Cookes*, 2 Atk. 449.

(*c*) *Batmore v. Graves*, 1 Vent. 260; *Roe v. Loreless*, 2 B. & Ald. 453; *Evelyn v. Worsfold*, 15 L. T. O. S. 4; *Randfield v. Randfield*, 3 De G. F. & J. 766; 31 L. J. Ch. 113; *Reg. v. Woodham Walter Manor*, 10 B. & S. 439.

(*d*) *Willowe's Case*, 13 Co. 1; *Hobart v. Hammond*, 4 Co. 27 b; *Leuke v. Pigot (Lord)*, 1 Selw. N. P. 87; *Douglas v. Dysart (Earl)*, 10 C. B. N. S. 688; *Fraser v. Mason*, 11 Q. B. D. 574; 52 L. J. Q. B. 643. As to the method of assessing the fine, see *Verulam (Earl) v. Howard*, 7 Bing. 327; *Richardson v. Kensit*, 5 Man. & G. 485; 12 L. J.

C. P. 154; *Att.-Gen. v. Sandover*, [1904] 1 K. B. 689; 73 L. J. K. B. 478.

(*e*) *Sheppard v. Woodford*, 5 M. & W. 608; 9 L. J. Ex. 90; *Richardson v. Kensit*, 5 Man. & G. 485; 12 L. J. C. P. 154.

(*f*) *Rex v. Bonsall*, 3 B. & C. 173. See *Doe v. Pearson*, 6 East, 173; per Lindley, L.J., *Evans v. Evans*, [1892] 2 Ch. 173, at p. 185; 61 L. J. Ch. 456.

(*g*) *Willowe's Case*, 13 Co. 1, 4th res.

(*h*) *Attree v. Scutt*, 6 East, 476; *Evans v. Upsher*, 16 M. & W. 675; 16 L. J. Ex. 185; *Reg. v. Eton College*, 8 Q. B. 526; 16 L. J. Q. B. 18.

to gain the exemption in respect of the remaining tenements (*i*), nor will the right be admitted where he makes a colourable purchase to obtain the advantage of the exemption or reduction (*k*).

Fine not due until admittance.

The lord cannot refuse admittance until the fine is paid, for the fine is not due until admittance (*l*). But he may refuse admittance, if previous fines in respect of the same title remain unpaid (*m*).

Fine upon change of lord.

By special custom a fine may be due upon a change of the lord by death. A custom to have a fine upon a change of the lord by alienation or other act of the party would be unreasonable and bad (*n*).

Fines for licences.

As before stated, a copyholder can only lease from year to year, except under the sanction of a custom (*o*). By special custom fines may be due upon licences granted to the copyholder to make leases, or to do other acts; but by general custom fines are due only upon admittances. Where the fines for such licences are certain, it seems that the lord cannot be compelled to grant them (*p*).

Fees to steward.

Fees are due by custom to the steward of a manor for his official services in regard to surrenders, admittances, copies of the rolls, and the like. The amount of the fees is in some cases fixed by the custom; in the absence of customary assessment the steward is entitled to claim a reasonable remuneration for his services (*q*).

Faalty and services.

By the general rules of customary tenure the lord is also entitled to fealty and suit of court; and by special custom or by express reservation he may be entitled to rents, reliefs, and heriots. "The doing of fealty by a copyholder proveth that a copyholder, so long as he observes the customs of the manor and payeth his services, hath a fixed estate; for tenant at will, that may be put out at pleasure, shall not do fealty" (*r*).

(*i*) *Erclyn v. Worsfold*, 15 L. T. 4; *Johnstone v. Spencer (Earl)*, 30 Ch. D. 581.

(*k*) *Att.-Gen. v. Sandover*, [1904] 1 Ch. 689; 78 L. J. K. B. 478. But see *Allen v. Flood*, [1898] A. C. 1; 67 L. J. Q. B. 119.

(*l*) *R. v. Hendon*, 2 T. R. 484; *Graham v. Sime*, 1 East, 632.

(*m*) *R. v. Coggan*, 6 East, 431; *R. v. Dullingham*, 8 A. & E. 858; 8 L. J. Q. B. 37. See *Re Naylor and Spendla's Contract*, 34 Ch. D. 217.

(*n*) *Lawther v. Raw*, Fort. 44; *Somerset (Duke) v. France*, 1 Strange, 654.

(*o*) *Ante*, p. 64.

(*p*) *Cowper v. Clerk*, 3 P. Wms. 155; *Reg. v. Hale*, 9 A. & E. 339; 8 L. J. Q. B. 83. See *Peachy v. Somerset (Duke)*, 1 Stra. 447; *Lehmann v. McArthur*, L. R. 3 Ch. 496; 37 L. J. Ch. 825.

(*q*) *Everest v. Glyn*, 6 Taunt. 425; *Reg. v. Bishopstoke*, 8 Dowl. P. C. 608; *Evans v. Upsher*, 16 M. & W. 675; 16 L. J. Ex. 185; *Truherne v. Gardner*, 5 B. & B. 913; 25 L. J. Q. B. 201. See *Allen v. Aldridge*, 5 Beav. 401.

(*r*) Co. Lit. 63 a. See *ante*, p. 18.

The lord may become entitled to the land by *escheat* upon the death of the tenant without leaving an heir and without having disposed of the tenement by will. By escheat the copyhold estate is merged or extinguished in the freehold, with all its incidents, of customary descent and the like; but it retains the capacity of being held by copy and may be regranted in that form of tenure (*s*). Escheat.

Forfeiture is the consequence of certain acts of the tenant which are inconsistent with the customary tenure or are violations of its rules (*t*). The alienation of the land by a conveyance operating at common law, and purporting to convey an estate of freehold tenure, operates as a disseisin of the lord and a forfeiture, except in the case of copyhold lands falling within the provisions of the Settled Land Act, 1882 (*u*). A deed conveying lands and tenements at common law will be construed, if possible, to apply to freehold lands only in order to avoid a forfeiture of copyhold (*x*). Forfeiture.

A lease at common law for more than a year, unless it be made with the licence of the lord or under a special custom to lease in that manner, operates as a ground of forfeiture (*y*). A document will be construed as a mere agreement for a lease instead of an operative lease, if possible, to avoid this effect (*z*).

Any acts of waste, injurious to the inheritance, whether permissive or voluntary, if there be no custom to the contrary, are cause of forfeiture; as pulling down a building, or suffering it to be out of repair, ploughing meadow, cutting trees, digging and removing minerals, removing fences and confounding boundaries, and the like (*a*).

By special custom a refusal to take admittance may operate as a forfeiture and entitle the lord to seize absolutely and not merely *quousque*, as by the general custom (*b*). A refusal to pay the proper fines or rent or to do the services of the tenure upon demand is ground of forfeiture (*c*). There were other causes of forfeiture, as attainder which followed upon judgment for treason

(*s*) See *ante*, p. 20; *post*, p. 74.

(*t*) Co. Cop. s. 57; Scriven, 437.

(*u*) *Brown's Case*, 4 Co. 21 *b*; 45 & 46 Vict. c. 38, s. 20.

(*x*) Co. Cop. s. 58. See *Smith v. Clyfford*, 1 T. R. 738; *Francis v. Minton*, L. R. 2 C. P. 543; 36 L. J. C. P. 201.

(*y*) *Ante*, p. 64. See *Peachy v. Somerset (Duke)*, 1 Stra. 447.

(*z*) *Doe v. Clare*, 2 T. R. 739; *Fenny v. Child*, 2 M. & S. 255.

(*a*) Co. Lit. 63 *a*; Hargrave's note, *ib.*; Co. Cop. s. 57; *Doe v. Clements*, 2 M. & S. 68; *Doe v. Burlington (Earl)*, 5 B. & Ad. 507; 3 L. J. K. B. 26.

(*b*) *Doe v. Hellier*, 3 T. R. 62.

(*c*) Co. Cop. s. 57; *Willow's Case*, 13 Co. 1; see *Grant v. Astle*, Dougl. 726, *n*. Fines may also be recovered by action of debt; *ib.* 727; and see *ante*, p. 69.

or felony, whereby the tenant became incapacitated to fill the tenancy and it reverted to the lord (*d*).

Operation of  
forfeiture.

Some acts of forfeiture operate by destroying the copyhold tenure, as conveyances which transfer the land to another for a freehold estate, for such an estate is wholly inconsistent with the copyhold tenure and is a disseisin of the lord's freehold. A forfeiture of this kind formerly occurred upon a conveyance by feoffment with livery, and upon conveyance by fine or recovery; and it may still occur by a conveyance transferring a freehold estate at common law (*e*).

But where the estate in remainder is made to commence upon the determination of the estate for life by forfeiture in the lifetime of the tenant for life, the remainderman and not the lord is the proper person to make the entry (*f*).

Waiver of  
forfeiture.

Other acts operate as forfeitures only at the election of the lord, by entitling him to enter and seize the tenement; such are leases without licence, acts of waste, refusal of services, and the like. As to these acts the forfeiture may be waived, and the lord is taken to do so by any acknowledgment of the tenancy continuing after notice of the act, as by accepting or distraining for rent, accepting a surrender, or the like; and if he does not himself enforce the forfeiture, it is taken as waived as against the succeeding lord. Hence no lord can take advantage of such acts of forfeiture but he who is lord at the time of the act committed. But the forfeiture produced by an act which destroys the copyhold cannot be waived; and a succeeding lord, under the same title, may exercise the right to enter and seize absolutely (*g*).

Extent of  
forfeiture.

A forfeiture extends to the whole of the tenement as to which the act is committed, but not to other separate tenements held by the copyholder of the same manor. It is confined to the estate of the forfeiting tenant and does not affect estates in remainder or reversion, which will take effect in the time and order prescribed by the terms of limitation, notwithstanding the forfeiture of the particular estate (*h*).

(*d*) *Rex v. Mildmay*, 5 B. & Ad. 254; *Rex v. Wiles*, 3 B. & Ald. 510. The 33 & 34 Vict. c. 23, s. 1, enacts that no judgment for any treason or felony shall cause any attainder or any forfeiture or escheat. It seems worthy of remark that this Act makes no mention of copyholds. See *ante*, p. 59.

(*e*) *Ante*, pp. 40, 54.

(*f*) *Benison v. Strode*, Pollexf. 614.

(*g*) *Doe v. Hellier*, 3 T. R. 162; *Doe v. Trueman*, 1 B. & Ad. 736; *Doe v. Bousfield*, 6 Q. B. 492; 14 L. J. Q. B. 42; *Doe v. Coombes*, 6 Q. B. 535; 14 L. J. Q. B. 37.

(*h*) *Podger's Case*, 9 Co. 107 a; *Doe v. Clements*, 2 M. & S. 68.



SECTION IV. EXTINGUISHMENT OF CUSTOMARY TENURE;  
REGRANT; ENFRANCHISEMENT.

Union of copyhold and freehold titles—surrender to lord—for particular estate—to lord having a particular estate.

Copyholder acquiring estate in the freehold—or in the manor.

Severance of the tenement from the manor.

Regrant of copyhold—must conform with the custom—regrant is voluntary.

Enfranchisement—to copyholder for life or years—to copyholder in tail—no tenure or services can be reserved—statutes to facilitate enfranchisement.

A customary estate is extinguished by the union of the freehold and customary title in the same person. The possession is then referred to the freehold title only, and may be disposed of under that title at common law.

Union of copyhold and freehold titles.

The customary title may vest in the lord, by surrender to his use, or release to him; also by escheat or forfeiture. It thereby becomes extinguished, though the tenement, in the hands of the lord, may retain the quality of being demisable upon the customary tenure, and may be regranted by him as copyhold (*a*).

Surrender to use of lord.

A surrender to the lord for a particular estate suspends the tenure during that estate only; and the customary tenant in remainder continues entitled according to the terms of his estate. For remainders, whether vested or contingent, are not accelerated or barred by the surrender or forfeiture of the particular estate, as was the case with like limitations of the freehold, but they may be made to commence upon the forfeiture of the particular estate (*b*).

Surrender for particular estate.

A surrender to a lord having a particular estate or limited interest in the manor operates as an extinguishment (subject to a regrant by copy) in favour of all persons having ulterior estates in the manor (*c*).

Surrender to lord having particular estate.

The freehold and customary title may also become united in the tenant. If the copyholder accepts a lease or other common law estate under the freehold title of the tenement, his copyhold

Extinguishment by copyholder acquiring estate under the freehold title.

(*a*) *French's Case*, 4 Co. 31 *a*; *Blemmerhasset v. Humberstone*, Hutt. 65; *Beverham's Case*, 2 Vent. 345.

(*b*) *Podger's Case*, 9 Co. 107 *a*; *Benison v. Strode*, Pollexf. 614; *Doe v.*

*Clements*, 2 M. & S. 68. See *ante*, p. 40.

(*c*) *St. Paul v. Dudley (Visc.)*, 15 Ves. 157; *King v. Moody*, 2 Sim. & S. 579. See *Bingham v. Woodgate*, 1 Russ. & M. 32.

Copyholder  
acquiring the  
manor.

interest, being a tenancy at will only relatively to such estate, is merged or extinguished absolutely. So, if the copyholder acquires by any means an estate in the manor, which includes the copyhold tenement, his copyhold interest is extinguished; but in this case, as lord of the manor, he would have the right to regrant the tenement to be held by copy (*d*).

Severance  
of the tene-  
ment from  
the manor.

If the lord conveys away the freehold title in a copyhold tenement, so that it is no longer parcel of the manor, the customary tenure is extinguished, except as to the rights of the copyholder. The rents and services reserved may continue due to the grantee of the freehold, but the rights incident to the lord, as such, namely, suit of court, fines upon admittance, and the like, are extinguished. They cannot be conveyed with the freehold of the tenement, except as parcel of the entire manor; for "a manor is an entire thing, and not severable," at least by act of the party; nor can a new manor be created at the present day. The copyholder may afterwards release to the grantee of the freehold or may take a release from him, and so unite the titles; and this seems the only mode of dealing with the legal title of a tenement so circumstanced; for it can no longer be conveyed by surrender because the land is no longer parcel of the manor (*e*).

Regrant of  
copyhold.

Where the copyhold tenement reverts to the lord, which may happen, as already noticed, in various ways:—by surrender to the use of the lord,—by expiration of the copyhold estate, as where it is for lives only, and the lives have expired,—by escheat or failure of heirs,—by forfeiture;—though the possession is then referred to his freehold title, and he may dispose of the tenement under that title by a common law conveyance; yet he may, if he pleases, grant it out again to be held by copy according to the custom of the manor (*f*).

In like manner, where the copyhold tenure is extinguished by the copyholder acquiring an estate in the manor, as lord of the manor he may again grant the tenement to be held by copy (*f*).

Regrant is  
independent  
of the lord's  
estate.

The grant by copy is an exercise of his power as lord; it does not take effect out of his estate and is not restricted thereby. Though entitled to the manor for a particular estate only, as for

(*d*) *Lanc's Case*, 2 Co. 16 b; *French's Case*, 4 Co. 31 a; *Cuttley v. Arnold*, 4 K. & J. 595.

(*e*) *Murrel v. Smith*, 4 Co. 25 a; *Sir Moyle Finch's Case*, 6 Co. 64 a; *Cuttley*

*v. Arnold*, 4 K. & J. 595; *Phillips v. Ball*, 6 C. B. N. S. 811; 29 L. J. C. 1. 7.

(*f*) *French's Case*, 4 Co. 31 a.

life or for years or at will, provided he is rightfully lord for the time being, he may grant the customary tenements to hold by copy; and if the custom be strictly followed his grant will bind the inheritance of the manor. The copyholder under such grant is in by the custom; his estate is independent of the freehold title of the manor, and is not affected by the charges and incumbrances attaching on that title (*h*).

The lord retains the power of granting the tenement by copy so long as he retains possession; but by any interruption of his possession, unless it be wrongful, the customary quality or capacity of the copyhold is interrupted and consequently lost. Thus, if the lord makes a lease for years or for life or any other estate at common law, the land can never after be granted by copy by him or any persons claiming under him; but the power of those in remainder or reversion after him to grant by copy is not affected. If the lord is wrongfully disseised, and the land is afterwards recovered, it is again grantable by copy (*i*).

Regrant is dependent upon the lord's possession.

In such regrant the lord must conform strictly to the custom, as to the tenement, the estate granted, the incidents and appurtenances of the estate, the tenure, the rents and services reserved, and all other points; for the grant being authorized only by the custom, deviation from the custom in any point would render it void (*k*).

Regrant must conform strictly with the custom.

The grant in such cases is voluntary and may be made for any estate within the custom; in this respect it differs from an admittance upon a surrender, which is a ministerial and compulsory act, directed and controlled by the uses of the surrender. An admittance, as conferring the legal title, is equivalent to a grant and may be so pleaded; but it has no force except as following the surrender, and an erroneous admittance cannot be supported as a voluntary grant (*l*). A grant entered upon the rolls imports an admittance or acceptance of the grantee as tenant (*m*).

Regrant by copy is voluntary.

A regrant, being voluntary, is not, like an admittance upon a surrender, restricted as to the fine or consideration to be paid for it; but the lord, as he is at liberty to grant or not, may ask what he pleases (*n*).

No restriction as to fine.

(*h*) *Clarke v. Pennifather*, 4 Co. 23 *b*; *Swayne's Case*, 8 Co. 63 *b*; *Doe v. Strickland*, 2 Q. B. 792; *Neal and Jackson's Case*, 4 Co. 26 *b*.

(*i*) *French's Case*, 4 Co. 31 *a*.

(*k*) *Badger v. Ford*, 3 B. & Ald. 153; *Doe v. Strickland*, 2 Q. B. 792; 11 L. J.

Q. B. 305.

(*l*) *Brown's Case*, 4 Co. 21 *a*; *Roe v. Loveless*, 2 B. & Ald. 457; *Zouch v. Forse*, 7 East, 186.

(*m*) *Roe v. Loveless*, 2 B. & Ald. 453; *Doe v. Whitaker*, 5 B. & Ald. 409.

(*n*) *Willowe's Case*, 13 Co. 3, 4th res.

- Enfranchisement. Enfranchisement is effected by the lord of the manor conveying the freehold title of the tenement in fee simple to the copyholder, or by a general release of the seignorial rights; the customary tenure is thereby wholly extinguished. An enfranchisement operates out of the lord's estate and not by exercise of his power as lord. It is therefore dependent upon his title to the manor, and can only be fully effected by a lord entitled in fee simple, or having a power of disposition to that extent. The conveyance of a less estate, or by a lord entitled for a less estate, would only give a limited title to the freehold; though by accepting such less estate the copyholder's interest would be merged and extinguished (*o*). A tenant for life has now a statutory power to enfranchise copyholds (*p*).
- By conveyance of freehold. Enfranchisement or conveyance of the freehold in fee simple to a copyholder for life or for years operates as an enfranchisement for the benefit of those in remainder (*q*). But it so operates in equity only; the legal estate in fee simple rests in the grantee and will pass to his heir or devisee; and a conveyance will be decreed to those entitled in remainder, upon equitable terms as to the consideration paid for the enfranchisement (*r*). Questions of this character will now, seldom arise, as tenants for life will exercise their power to have capital moneys laid out in purchasing the freehold, which will be conveyed to the trustees of the settlement (*s*).
- To copyholder for life or years. Enfranchisement to a copyholder in tail bars the entail and all ulterior estates and limitations, and leaves no interest at law or in equity in the issue in tail or the remainderman (*t*).
- To copyholder in tail. Upon an enfranchisement since the statute of *Quia emptores* no tenure or services can be reserved; because the grantee of the freehold holds of the next superior lord. Consequently, if the deed of enfranchisement purports to reserve a rent, it is not a rent-service, but in the nature of a rent-charge granted by the tenant (*u*).
- No tenure or services can be reserved. An enfranchisement may be presumed in favour of a long possession and course of dealing with the tenement as freehold (*x*).
- Enfranchisement presumed.

(*o*) *Lane's Case*, 2 Co. 16 b; *Samme's Case*, 13 Co. 54; *Doe v. Huntington*, 4 East, 271. See *Fawlkner v. Fawlkner*, 1 Vern. 21.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3.

(*q*) *Roe v. Briggs*, 16 East, 415; see *Doe v. Jackson*, 1 B. & C. 448.

(*r*) *Wynne v. Conkes*, 1 Bro. C. C. 515; *Wilson v. Allen*, 1 J. & W. 611, 621.

(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21.

(*t*) *Roe v. Briggs*, 16 East, 406; *Challoner v. Murhall*, 2 Ves. jun. 524; *Re Hart*, 41 Ch. D. 547; 58 L. J. Ch. 752.

(*u*) *Bradshaw v. Lawson*, 4 T. R. 443; see *ante*, p. 12.

(*x*) *Roe v. Ireland*, 11 East, 280.

Statutes have been passed from time to time to facilitate the enfranchisement of customary tenures, at the instance either of the lord or of the tenant, providing for compensation for the rents and services by the payment of a gross sum or a fixed rent-charge (y).

Statutes  
facilitating  
enfranchise-  
ment.

(y) Copyhold Act, 1894 (57 & 58 Vict. c. 46).

## CHAPTER III.

## THE LAW OF USES.

Section I. Uses before the Statute of Uses.

II. Uses since the Statute of Uses.

III. Operation and limits of the Statute of Uses.

## SECTION I. USES BEFORE THE STATUTE OF USES.

Origin and nature of Uses.

Uses at law—possession of *cestui que use*.Uses in equity—enforced by *subpoena*—not subject to rules of tenure—  
assignment of uses—disposition by will—descent.

Statutes concerning uses—the Statute of Uses.

Uses.

The law of freehold tenure above described was administered in the courts of common law. A concurrent jurisdiction over property in land was exercised by the Court of Chancery in the system of Uses; which was subsequently, to a great extent, incorporated with the law of freehold tenure by the Statute of Uses.

Origin and  
nature of  
uses.

The system of Uses was founded on the practice, adopted in early times for various purposes, of transferring the seisin or legal possession of the land by feoffment or other sufficient mode of conveyance to some person or persons upon a trust or confidence to permit the feoffor or some person to have the *Use*. This trust was at first of a secret nature, and not mentioned in the charter of feoffment or instrument of conveyance; but afterwards a clause was commonly inserted expressing that the feoffees were to hold “*to the use*” of the person intended to be thereby benefited. The latter person became known as the *cestui que use*, relatively to the legal feoffees who were commonly known as the *feoffees to uses* (a).

(a) As to the origin of uses, see 1 Sanders, Uses, ch. 1; Co. Lit. 272 a. In the feoffments collected in Madox's “Formulare Anglicanum,” joint feoffees, which may be taken as the sign in early deeds of secret uses (see *post*, p. 82), appear first towards the end of the reign of Edw. III.; see forms 337, 49 Edw. III.; 389, 50 Edw. III.; 339,

13 Ric. II. It is probable that before the statute *Quia emptores*, 18 Edw. I., if a tenant in fee simple enfeoffed a stranger without any consideration, and without expressing any use, there could be no resulting use in the feoffor, because the tenure and services supplied a consideration to carry the use to the feoffee. See *post*, p. 84.

The courts of law took no notice of the use or trust; they regarded the feoffee exclusively as tenant of the land for all purposes. His seisin or possession was subject to all the services and incidents of tenure, and was liable to escheat and forfeiture. He had the power to aliene the land by feoffment or other legal conveyance; and it passed by descent to his heir.

Uses at law.

*Cestui que use*, as such, had no estate or interest in the land at law; and no remedy in a court of law against the feoffees to uses, nor against strangers. But while in possession, with the consent of the feoffees, he was in the legal position of a mere tenant at will (*b*).

Possession of *cestui que use*.

In the Court of Chancery, on the other hand, the *use* imparted all the beneficial incidents of property, namely, the right of occupying and enjoying the land *in specie*, and of taking the profits, also the power of directing the disposal of it to another. The correlative *trust* imposed on the feoffee consisted in permitting the *cestui que use* to occupy and take the profits, in preserving the legal title on his behalf, and in executing conveyances of the land according to his direction (*c*).

Uses in equity.

The Court of Chancery exercised jurisdiction over the use by giving to the *cestui que use* the remedy *by subpoena* against the feoffee to compel him to disclose and perform the use or trust upon which he held the land (*d*). The Court of Chancery also in course of time enforced the trust against the heir of the feoffee to uses taking the land by descent; also against a purchaser from the feoffee to uses taking the land with notice of the trust, or without consideration. But a purchaser for a valuable consideration and without notice of the trust held the land free of any claim in equity on the part of the *cestui que use*, whose remedy in such case lay against the feoffee only, for the breach of trust committed in parting with the land (*e*).

Enforced in Chancery by *subpœna*.

Accordingly, a use was summarily defined by Coke in the following terms:—"A use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* shall take the profit, and that the terre-tenant shall make an estate

(*b*) Co. Lit. 271 *a*, *b*, and Butler's note (1) to Co. Lit. 271 *b*, sect. ii.; 1 Sanders on Uses, 65 *et seq.*

(*c*) Co. Lit. 272 *b*; 1 Sanders, Uses, c. 1.

(*d*) 1 Sanders, Uses, 15, 19.

(*e*) *Chudleigh's Case*, 1 Co. 122 *a*, *b*;

Bacon, Uses, 15, Tracts, p. 312; 1 Sanders, Uses, 56. See the progressive jurisdiction over uses stated by Lord Mansfield in *Burgess v. Wheate*, 1 Eden, 218, 219; and see 1 Spence, Eq. Jur. 442, 445.

according to his direction. So as *cestui que use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by *subpoena* in Chancery" (*f*).

Uses not  
subject to  
rules of  
tenure.

By these means the use or beneficial ownership of the land was withdrawn altogether from the rules of tenure and from the feudal dues and incidents attaching to the legal estate. The legal ownership was still subject to these obligations, and though the regular services of the tenure could not be avoided and might be enforced against the land, yet by vesting the seisin in numerous feoffees jointly, whose number was from time to time renewed by a new feoffment to others upon the subsisting uses, it was kept almost entirely clear of the occasional charges which fell due by reason of descents, wardships, marriages, alienations, and the like, and from the graver incidents of escheat and forfeiture (*g*).

Power of  
disposition  
over uses.

By these means also the use became disposable, according to the rules of equity and independently of the rules of law, except so far as they were followed in equity.—It was assignable without feoffment or deed, attornment, entry, or any other common law formality (*h*).—It was devisable by will, although the freehold was not so devisable. A feoffment might be made of lands to uses to be declared by will, and the will then took effect by declaring the uses (*i*).

Disposition  
by will.

Descent of  
uses.

An estate of inheritance in the use descended, upon an intestacy, according to the rules of the common law, or according to the special customs of descent, if any, to which the land was subject (*k*).

Statutes  
relating to  
uses.

Statutes were passed from time to time bringing the use within legal cognizance for certain purposes, amongst which may be mentioned, as being the most important, the statute 1 Ric. III. c. 1, giving the *cestui que use* a direct power of conveying

(*f*) Co. Lit. 272 *b*; see this definition developed and applied to trusts in Lewin on Trusts, c. 1. Compare the simpler and broader foundation of modern trusts since the Statute of Uses, as established by Lord Nottingham, and expressed in the maxim that the trust in equity is the land, *post*, p. 98.

(*g*) Butler's note to Co. Lit. 191 *a*, sect. v. (11); *ib.* 271 *b*, II. Besides the evasion of the rules of tenure, conveyances to uses were also employed in early times by religious persons or corporations to evade the Statutes of Mortmain, which prohibited such per-

sons from purchasing land in their own right, until the statute 15 Ric. II., c. 5, brought uses also within the prohibition of those statutes: 1 Sanders, Uses, 15. See the various objects served by uses fully stated in St. German's "Doctor and Student," Dialog. 2, c. 22.

(*h*) 1 Sanders, Uses, 64; Bacon, Uses, 16.

(*i*) *Chudleigh's Case*, 1 Co. 123 *b*; 1 Sanders, Uses, 64; Bacon, Uses, 20, Tracts, 315.

(*k*) *Corbet's Case*, 1 Co. 88 *a*; 1 Sanders, Uses, 62.



the legal estate (*l*) ; but the earlier statutes were superseded in effect by the statute 27 Hen. VIII. c. 10, commonly known as the Statute of Uses, which was passed with the object of at once converting the use into legal possession (*m*). The preamble of the statute recites that “where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made *bonâ fide* without covin or fraud;—yet nevertheless divers subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents and trusts, and also by wills and testaments sometime made by nude parols and sometime by writing;—by reason whereof heirs have been unjustly disherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids, and scantily any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or execution, for their rights titles and duties—to the utter subversion of the ancient common laws of this realm.”

The Statute of Uses.

Preamble as to transfer at common law.

Evils resulting from uses.

The statute enacts, by sect. 1, “that where any person or persons stand or be seised, or at any time hereafter shall happen to be seised of any honours, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments to the use confidence or trust of any other person or persons or of any body politic by reason of any bargain, sale, feoffment, recovery, covenant, contract, agreement, will or otherwise by any manner of means whatsoever it be, that, in every such case, all and every such person and persons and bodies politic that have or hereafter shall have any such use confidence or trust in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seised deemed and adjudged in lawful seisin estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents constructions and purposes in the law, of and in such

Persons having the use for any estate shall be in lawful seisin of same estate as they have in the use.

(*l*) See Co. Lit. s. 272 *a, b* ; 1 Sanders, Uses, 23 ; see the statutes collected in Bacon, Uses, 22, Tracts, 320.

(*m*) “The title in course of pleading is, *statutum de usibus in possessionem transferendis*.” Bacon on Uses, 31, Tracts,

325. As to the intention of the statute, see *Chudleigh's Case*, 1 Co. 124 *a* ; *Brent's Case*, 2 Leon. 17 ; and see 1 Sanders, Uses, 83 ; 1 Spence, Eq. Jur. 461.

Estate and possession of person seised to uses shall be deemed to be in them that have the use.

like estates, as they had or shall have in use trust or confidence of or in the same : And that the estate right title and possession that was in such person or persons that were or shall be hereafter seised of any lands tenements or hereditaments to the use confidence or trust of any such person or persons or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use confidence or trust after such quality manner form and condition as they had before in or to the use confidence or trust that was in them."

Sect. 2 enacts to the same effect in the case where divers and many persons shall be jointly seised to the use, confidence or trust of any of them that be so jointly seised (*n*).

## SECTION II. USES SINCE THE STATUTE OF USES.

Creation of uses within the statute—with transmutation of possession—declaration of use—uses raised by payment of consideration—resulting uses.

Creation of uses without transmutation of possession—bargain and sale—covenant to stand seised.

Limitation of uses—express limitations—resulting uses—limitation of uses upon bargain and sale—uses in remainder—springing and shifting uses—powers of revocation and new appointment—uses limited to the grantor—or to his heirs.

Creation of uses within the Statute of Uses.

As the statute did not prohibit or prevent the creation of uses in the future, but operated by executing them, that is, converting them into legal estates, the creation of uses became the means, by force of the statute, of creating and conveying legal estates ; and it thenceforth became necessary for the courts of common law to take cognizance of such modes of conveyance, and of the doctrines of uses upon which they depended. These doctrines, which for the most part are still applicable, may be shortly stated as follows.

Uses may be raised under two conditions, involving different considerations ;—with transmutation of possession, where uses are created upon an actual transfer of the seisin or legal possession ;—without transmutation of possession, where new uses are created upon the existing seisin (*a*).

(*a*) It was the common practice to make the *cestui que use* himself one of the joint feoffees to uses, and to place his name first among them. See *Brent's Case*, 2 Leon. 15 ; *Madox Form. Angl. ante*, p. 78, u. (*a*). The above section

of the statute expressly provides for such cases.

(*a*) 1 Sanders, Uses, pp. 83 *et seq.* ; Co. Lit. 271 *b* ; Butler's note, *ib.* iii. (3) ; 1 Hayes, Conv. 76, 5th ed.

With transmutation of possession :—Upon a conveyance operating upon the possession at law a mere declaration or expression of intention is sufficient to create and direct the uses of the conveyance. It is not essential that the word “use” be employed; any words expressing the intention of treating and limiting the beneficial interest in the land separately from the legal possession, and that the legal possession should be held for that intent and purpose, would be sufficient to create a use, which would be executed by the statute accordingly (*b*).—Thus, upon a feoffment or conveyance of land to A. and his heirs, to the use of B. and his heirs, or upon trust or confidence for B. and his heirs, or to permit B. and his heirs to take the profits, or in any terms to the like effect, the use is in B., and the statute vests the legal estate in him according to the use (*c*).

With transmutation of possession—by declaration of uses.

The declaration of the uses might have been made without writing until the passing of the Statute of Frauds, 29 Car. II. c. 3, s. 7, enacting “that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing or else they shall be utterly void and of none effect.” This enactment applies to uses; but the following section (8) excepts those “which may arise or result by implication or construction of law.” These are next to be considered (*d*).

Declaration of use must be proved by writing.

In the absence of express declaration as to the use the statement of a consideration paid serves as an implied declaration of the use to the feoffee or grantee; and for the purpose of marking the intention, the amount of the consideration is immaterial; a merely nominal consideration would suffice. But the presence or absence of a consideration has no effect to vary an express declaration of the use (*e*).

Use raised by payment of consideration.

Upon a feoffment or conveyance in fee, if there be no declaration of use, nor any consideration expressed to be paid, the use remains in the grantor, and is commonly called a *resulting use*. The statute executes the use and the grantor continues seised as before (*f*). This presumption against the use passing was founded on the general prevalence of the early practice of secret

Resulting uses.

(*b*) 1 Sanders, Uses, 95.

(*c*) 1 Sanders, Uses, 95 *et seq.*; *Right v. Smith*, 12 East, 455; *Doe v. Biggs*, 2 Taunt. 109.

(*d*) *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196; *Dyer v. Dyer*, 2 Cox, 92; 2 Wh. & T. L. C. Eq. 803. Gilbert,

Uses, 270, 271; 1 Sanders, Uses, 352 *et seq.*

(*e*) 1 Sanders, Uses, 59, 60, 102, 2 *ib.* 96; see Gilbert, Uses, 45.

(*f*) *Beckwith's Case*, 2 Co. 58 *a*; *Armstrong v. Wolsey*, 2 Wils. 19; 1 Sanders, Uses, 96, 352.

uses; it was presumed not to pass unless expressly declared so to do, or paid for with a consideration, and the proof of consideration was put upon the purchaser (*g*).

Resulting  
uses of  
reversion on  
partial use.

Upon the same principle, if upon a feoffment or conveyance in fee the use be declared for a particular estate only, and no consideration appear to carry the residue, so much of the use as is undisposed of by the declaration remains in the grantor as a resulting use. Thus, if the use be declared to the grantee or another for life, or in tail, or for years only, the reversion of the use being undisposed of results to the grantor. And a consideration paid in such a case will be presumptively attributed to the estate limited, and will afford no inference as to the use undisposed of (*h*).

Use declared  
to grantor  
rebutts result-  
ing use.

But if the use be declared to the *grantor* for an estate for life or years, the reversion, though not expressly disposed of, does not result to him but vests in the grantee; for by the opposite construction the particular estate would merge in the reversion and the grantor would resume the entire fee, against the express terms of the declaration of uses, which restricts his interest to the particular estate. If, however, the use be declared to the grantor for an estate tail, he may also take the reversion by resulting use; for an estate tail and the reversion in fee may subsist together in the same person (*i*).

Consideration  
of tenure  
prevents  
resulting use.

If the feoffment or conveyance of the legal possession be made for a particular estate only, as a gift in tail, or a lease for life or for years, the tenure alone thereby created, with its attendant services and obligations, supplied a consideration sufficient to prevent the use from resulting, and to carry it to the donee or lessee; and this doctrine applies at the present day. But an express use declared in favour of another would rebut the use implied from the tenure in such cases (*k*). The statute *Quia emptores* prevented the creation of any tenure which might carry the use upon a conveyance of the fee simple (*l*).

(*g*) *Ante*, p. 78. See Bacon, Uses, p. 22; Gilbert, Uses, 45; 1 Spence, Eq. Jur. 451.

(*h*) Co. Lit. 22 *b*, 23 *a*, 271 *b*; Sanders, Uses, 101.

(*i*) Bacon, Uses, Rowe's ed. notes, p. 223; 1 Sanders, Uses, 101; see *Adams v. Savage*, 2 Salk. 679; L. Raym. 854. "Generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together: in such case by the

operation of the statute *de donis*, the estate tail is kept alive, not merged by the reversion in fee." *Per* Kenyon, C.J., *Roe v. Baldwre*, 5 T. R. 110.

(*k*) 1 Sanders, Uses, 9; Perkins, ss. 534-537; *Brent's Case*, 2 Leon. 16; Dyer, 312 *a*. The relation of landlord and tenant is a consideration in law, hence in a contract for a lease no other consideration is necessary. *King's Leascholds*, L. R. 16 Eq. 521.

(*l*) Perkins, s. 528, 529; see *ante*, p. 12, n. (*h*).

Uses may also be raised upon the existing seisin without a conveyance or transmutation of the legal possession:—Upon principles of equity any agreement, supported by a valuable consideration, to the effect that an estate or interest in land should be conveyed, as it might be specifically enforced in the Court of Chancery, was held to entitle the purchaser to the use or beneficial ownership according to the terms and intent of the agreement, without any legal conveyance; and accordingly the vendor was held to be or stand seised to the use of the purchaser (*m*). Such transaction, as creating a use executed by the statute, became technically known as a *bargain and sale*.

Uses raised without transmutation of possession.

By bargain and sale.

As a bargain and sale would thus have been effectual to convey a legal estate under the statute by mere force of the agreement without any writing or formality, it was thought expedient to add some formal conditions to the operation of the statute upon it; and it was enacted by a statute of the same session of parliament, 27 H. VIII. c. 16, to the effect that no estate of *freehold* shall pass by reason only of a bargain and sale, unless made by *writing indented, sealed and enrolled* in manner and place therein provided. This statute applied only to estates of freehold, and a use for a term of years might still be created within the Statute of Uses by mere bargain and sale without deed or enrolment (*n*).

Formalities required by statute of enrolments.

An agreement unsupported by a valid consideration, or a mere declaration of use without transfer of possession, was altogether void of effect in raising a use within the statute by reason of the principle that equity will not enforce gratuitous or, as they are called, voluntary agreements. And, in general, no distinction was admitted in equity in this respect by reason of the agreement or declaration being made in the form of a covenant or by deed under seal; although in law such formality supplied the force of a consideration (*o*). But the value or amount of the consideration paid was immaterial; the existence or expression of it was sufficient to denote that the transaction was intended by way of bargain and not as a mere voluntary agreement; and if not a voluntary agreement it was effectual to raise a use by way of bargain and sale (*p*).

Consideration necessary.

Value of consideration immaterial.

(*m*) See *Rose v. Watson*, 10 H. L. C. 672; 33 L. J. C. 385; *L. & S. W. Ry. v. Gomm*, 20 Ch. D. 562; 51 L. J. C. 530; *Whitbread & Co. v. Watt*, [1902] 1 Ch. 835; 71 L. J. C. 424.

(*n*) *Four's Case*, 8 Co. 93 *b*; but a mere termor. not being *seised*, could not create or transfer uses under the Statute

of Uses, see *post*, p. 92.

(*o*) Bacon, Uses, 13; Tracts, 310; Sanders, Uses, 56; see *Ellison v. Ellison*, 6 Ves. 656; 2 Wh. & T. L. C. Eq. 835; *Jefferys v. Jefferys*, Cr. & Ph. 138.

(*p*) Case of *Sutton's Hosp.*, 10 Co. 23 *a*; *Barker v. Keat*, 2 Vent. 35. See *Shortridge v. Lamplugh*, 2 Ld. Raym. 798.

Covenant to stand seised.

Good consideration.

An exception to the general rule of equity not to enforce voluntary agreements was made in the case of a covenant or declaration by deed executed by the person seised to stand seised to the use of his wife, child, or some blood relation. The *motive* then stood in place of a consideration, and it was said to be made upon a *good* consideration, as distinguished from a consideration of money or value, which formed the characteristic of a bargain and sale. A *Covenant to stand seised to uses* was thus a recognised mode of raising uses in family settlements (*q*).

Accordingly, a covenant to stand seised to the use of the brother of the covenantor raised a use in him; so a covenant to stand seised to the use of the heirs male of the body, or the heirs male special of the body of the covenantor effectually raised a use in such heirs male (*r*). But an illegitimate child is not within the consideration of blood to raise a use (*s*).

A covenant to stand seised to the use of a son or relative, if expressed to be made for a valuable consideration, is a bargain and sale, and requires enrolment under the statute; because the consideration expressed excludes the implied motive or consideration of relationship (*t*). The same deed may operate both as a covenant to stand seised and as a bargain and sale in favour of different parties, "as if A. covenants that in consideration that B. is his son, he shall have for life, and after his death in consideration that C. hath given him £100 that he shall have in fee" (*u*). A *good* consideration would not supply the want of a *valuable* consideration for the purpose of raising a use by an agreement or declaration not under seal (*v*).

These modes of conveyance, operating without transmutation of possession, were formerly employed for the purpose of avoiding the formalities necessary for transmutation of possession at common law, such as livery of seisin, entry, attornment and the like; but a deed of grant being now in all cases sufficient without other formality to transfer the legal possession, upon which uses may be declared, the conveyances by bargain and sale and covenant to stand seised are no longer required or used. Some knowledge of them, however, is still necessary for the investigation

(*q*) *Chester v. Willan*, 2 Wms. Saund. 283 and notes; *Mildmay's Case*, 1 Co. 175 *a*; *Bedell's Case*, 7 Co. 40 *a*. "No action of covenant shall be maintainable upon the deed, nor any other advantage made of it, if it does not raise the uses." *Sharlington v. Strotton*, Plowden, at p. 308. See 2 Samlers, Uses, 96.

(*r*) *Sharlington v. Strotton*, Plowd. 298.

(*s*) Co. Lit. 123 *a*; Hargrave's note (8), *Ib*.

(*t*) *Bedell's Case*, 7 Co. 40 *a*; *Clarkson v. Hanway*, 2 P. Wms. 203.

(*u*) *Lord Paget's Case*, cited 1 Co. 154, *a, b*.

(*v*) Bacon, Uses, 44, as corrected in Rowe's edition; the passage as printed in Bacon's Tracts, 336, is unintelligible; Gilbert, Uses, 271.

of past titles; and it also occasionally happens that a deed of grant, which is defective as intended to operate, may be supported, upon a good consideration, as a covenant to stand seised; it could not be supported, upon a valuable consideration, as a bargain and sale without enrolment (*y*).

In an express declaration of uses within the statute the same estates may be limited, and the same terms are used and receive the same construction as in limiting estates at common law; thus the use may be limited in fee, in tail, for life or for years. The technical limitation "to the heirs" is necessary to convey an estate of inheritance in the use, as in the freehold at common law; and a declaration of use to a person, without words of limitation, is construed in a deed to give only an estate for life (*z*).

Limitations of uses.

Express limitations follow the construction of law.

Resulting uses, arising in the absence of express declaration, follow the original estate of the grantor, according to the presumed intention, being the uses remaining in him, subject to those expressly limited (*a*).

Resulting uses how construed.

A bargain and sale before the statute raised a use in the purchaser without express declaration and without any words of limitation, by force of the agreement that he should take the estate of the vendor. But after the statute, when a bargain and sale became a recognised form of legal conveyance, it was held that the estate intended to be conveyed must be limited in the same technical terms as in conveyances at common law; and a bargain and sale of lands, not expressly limiting the use "to the heirs" of the bargainee, was construed to convey only an estate for life, according to the rule of common law (*b*).

Limitation of uses upon bargain and sale.

Uses may be limited by way of particular estate and remainders; and such limitations being executed by the statute become subject to the rules of law regulating remainders. Accordingly, upon a conveyance to the use of A. for a term of years, with remainder to the use of B. for an estate of freehold in contingency, the use in remainder is void for want of an estate of freehold to support it; though before the statute, when the freehold remained in the feoffees, the use was well created in equity, and took effect according to its terms (*c*).

Uses in remainder.

(*y*) *Chester v. Willan*, 2 Wms. Saund. 283 and notes; *Doe v. Prince*, 20 L. J. C. P. 223.

(*z*) *Abraham v. Twigg*, Cro. El. 478; 1 Sanders, Uses, 122, 123; *ante*, pp. 23, 24.

(*a*) *Clere's Case*, 6 Co. 17 *b*; *Beckwith's Case*, 2 Co. 58 *a*; *Doe v.*

*Whittingham*, 4 Taunt. 20.

(*b*) *Corbet's Case*, 1 Co. 87 *b*; *Shelley's Case*, 1 Co. 100 *b*; 1 Sanders, Uses, 122.

(*c*) *Adams v. Savage*, 2 Salk. 679; Sugden's note to Gilbert on Uses, p. 164; Fearn, Cont. Rem. 284; see *ante*, p. 33.

Springing  
uses.

The limitation of uses is not restricted by the doctrines of common law concerning the seisin; and, therefore, a use for a freehold estate may be limited to arise *in futuro* or upon a contingency without any prior limitation to support it as a remainder.—Thus a conveyance of the immediate legal possession may be made to the use of a person and his heirs, after four years, or after the death of the grantor, or to such uses as the grantor shall appoint by will (*d*). So, a bargain and sale might be made to the use of another after four years;—so, a covenant to stand seised to the use of another after the covenantor's death (*e*).

In all such cases of uses to arise *in futuro*, the use being undisposed of except at the time or in the event specified, results or remains in the grantor or covenantor in fee simple as before, until the future use arises to displace it; the use does not result or remain for a particular estate only, so as to convert such limitations into remainders (*f*).

Shifting uses.

A future estate in the use may also be limited to take effect in substitution or defeasance of a previously limited estate, and even of an estate in fee simple; for the rules of common law, not admitting of any future limitations shifting the freehold except by way of remainder, nor of any limitations after an estate in fee simple, had no application to the use. A marriage settlement is a well-known instance of such limitations; where the use is first limited to the settlor in fee, and, upon the marriage taking place, then to the uses of the settlement (*g*).

Future uses of the above kinds, including all such as are not limited by way of remainder, are called *springing* or *shifting uses*, the former term more especially denoting those that arise or spring up without any prior limitation; the latter denoting those that shift the use in substitution of a prior estate (*h*). Being executed by the statute, they made a great advance upon the common law in the limitation of future estates.

Powers of  
revocation  
and new  
appointment.

Springing or shifting uses may be thus limited to arise upon an event or in a manner fully specified in the deed declaring the uses; or they may be limited to arise according to the appointment or direction of some person named in the deed for that purpose;—whose authority is therefore described as a *power of*

(*d*) *Clerc's Case*, 6 Co. 17 *b*; *Daries v. Speed*, 2 Salk. 675, *per* Holt, C. J. See Sugden, Powers, 24 *et seq.*

(*e*) *Roe v. Trammar*, Willes, 682; *Doe v. Whittingham*, 4 Taunt. 20; *Doe v. Prince*, 20 L. J. C. P. 223.

(*f*) Bacon, Uses, Rowe's ed. note (137);

Gilbert, Uses, by Sugden, 161, 162. And see *post*, p. 252.

(*g*) 1 Sanders, Uses, 141; Gilbert, Uses, by Sugden, 153; Sugden, Powers, 27 *et seq.*

(*h*) Sugden's note to Gilbert, Uses, 152.



*appointment*, or (as the uses appointed thereunder necessarily revoke and defeat those previously subsisting,) a *power of revocation and new appointment*. The power of revocation is sometimes, though unnecessarily, added in express terms. The uses appointed in exercise of the power take effect as if originally declared in the deed (i).

Powers of appointment created by bargain and sale or by covenant to stand seised are required to be restricted to persons within the consideration ; because in those modes of conveyance, operating without transmutation of possession, the uses must be supported by a valid consideration (k).

It was impossible at common law for a person to make a direct conveyance to himself with the effect of changing the title into one by purchase ; nor could a person make his own heirs to take by purchase ; all such limitations being void and inoperative. But indirectly, by conveying the legal estate to another and declaring uses in his own favour, a person might acquire a new estate to himself, as a purchaser, by force of the Statute of Uses. Thus, if a person convey to another to the use of himself for life, or for years or in tail, he takes a new estate by the statute measured by those limitations. So, by a conveyance to the use of another for life, with remainder to the use of himself and the heirs of his body, the statute executes an estate tail in him as a purchaser (l).

Uses limited to the grantor.

But upon a conveyance by a tenant in fee simple to the use of himself and his heirs or upon a resulting use to himself and his heirs, he was still held to be in of the ancient use and not by purchase (m). So, the limitation of a remainder to the use of the heirs of the grantor had the same effect as at common law in leaving the reversion in the grantor, and the heir took nothing by way of purchase (n). Now by the Inheritance Act, 1833, as before stated, under limitations to the person or to the heirs of the person who shall have conveyed the land, such person is to be considered as entitled by purchase and not as of his former estate (o).

Uses limited to the grantor and his heirs,

to the heirs of the grantor.

(i) Co. Lit. 237 a ; Gilbert, Uses, by Sugden, 153, 158 ; Sugden, Powers, 30 *et seq.* ; 1 Sanders, Uses, 142.

(k) Gilbert, Uses, by Sugden, 91, 163, 398, 420 ; 2 Hayes Conv. 51 n. (43), 81 n. (64) ; *Mildmay's Case*, 1 Co. 175 a. See *ante*, pp. 85, 86.

(l) Co. Lit. 22 b ; 1 Sanders, Uses, 134 ; Gilbert, Uses, by Sugden, 150 ; Sugden, Powers, 24 *et seq.* See *ante*, pp. 36, 37.

(m) Co. Lit. 12 b, 13 a ; Hargrave's

note (2) to Co. Lit. 12 b ; *Shelley's Case*, 1 Co. 100 b ; see *Roe v. Baldwre*, 5 T. R. 101 ; *Cholmondeley (Marquis) v. Clinton*, 3 B. & Ald. 625.

(n) *Fenwick v. Mitford*, 1 Leon. 182 ; Co. Lit. 22 b ; 1 Sanders, Uses, 136 ; Fearne, C. R. 51. And see Fearne, C. R. 66.

(o) See *ante*, p. 37 ; as to the effect of such limitations in breaking the line of descent, see *ante*, p. 44.

## SECTION III. OPERATION OF THE STATUTE OF USES.

Operation of the statute in executing the use—nature of the possession transferred.

Mode of operation upon future and contingent uses—doctrine of *scintilla juris*—Lord St. Leonards' Act.

Seisin required to support uses—seisin not co-extensive with the uses—seisin for life—seisin in tail.

Limits of operation of the statute—uses declared upon possession for term of years—uses limited to the grantee of the legal possession—uses limited upon a use.

Special or active trusts—passive trusts or uses.

Application of the Statute of Uses to wills.

The statute does not apply to copyholds.

Operation of the statute in executing the use.

The statute executes the use, that is to say, invests it with the seisin or legal title, and subjects it to all the incidents of a legal estate. The grantee to uses is divested of all estate and interest in the land, and the *cestui que use* becomes seised or possessed in law of the same estate and interest which is limited to him in the use (*a*).

Nature of possession transferred.

The possession transferred by the statute is equivalent, for most purposes, to that acquired by livery of seisin, or, in case of leaseholds, by entry (*b*).

Mode of executing future and contingent uses.

The mode of operation of the statute with future uses, when limited by way of contingent remainders or as springing or shifting uses, formerly caused much perplexity and difference of opinion. The statute seemed to exhaust the seisin in serving the prior vested uses, so as to leave none to serve such future uses as and when they should arise. To meet this difficulty it was conceived that there remained in the grantees to uses a possibility of seisin, becoming an actual seisin when the executory uses required it. This was the celebrated doctrine of the *scintilla juris*, as this possibility of seisin was called. The only practical bearing of this doctrine lay in the suggestion that the *scintilla juris* might be dealt with in a manner to endanger the safety of the dependent uses.

Doctrine of *Scintilla juris*.

After much abstruse speculation concerning the nature of the statutory process the result generally accepted seems to have

(*a*) *Re Dudson's Contract*, 8 Ch. D. 628; 47 L. J. C. 632; Co. Lit. 22 *b*; Bacon, Uses, 45, Tracts, 337; 1 Sanders, Uses, 117.

(*b*) See *Hadfield's Case*, L. R. 8 C. P.

306; 42 L. J. C. P. 146, and the authorities there cited; *Re Dudson's Contract*, 8 Ch. D. 628; 47 L. J. C. 632; 2 Sanders, Uses, 55.

been that it immediately converted uses of all admissible kinds into legal limitations in a manner quite beyond the power or control of the grantees to uses, and that the latter were merely formal instruments for carrying the legal title to the uses (c).

All question as to the operation of the statute has been removed by the statute 23 & 24 Vict. c. 38, s. 7, "Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere."

Statutory enactment that all uses take effect out of original seisin.

There must be a seisin to support uses to be executed by the statute. A conveyance purporting to transfer the freehold at a future date is void at common law, and will not support a declaration of uses; which, therefore, in such case, unless it can be supported upon the seisin of the grantor, without transmutation of possession, fails altogether. Thus, a grant to A. and his heirs after the death of the grantor is void, as purporting to transfer the seisin at a future time; but a grant to A. and his heirs, to the use of B. after the death of the grantor, is good, the transfer of seisin being present and the use only future; and the use is executed by the statute (d).

Seisin required to support uses.

The grant of a vested remainder or reversion conveys the seisin corresponding to such estates, and uses may be declared upon the seisin so transferred in remainder or reversion, and will be executed by the statute (e).

The case of the seisin not being co-extensive with the uses declared upon it is not expressly provided for in the statute. According to Bacon, "the matter and substance of the estate of *cestui que use* is the estate of the feoffee, and more he cannot

Seisin not co-extensive with the uses.

(c) *Chudleigh's Case*, 1 Co. 120 a; *Fearne*, Cont. Rem. 300; 1 *Sanders*, Uses, 108; *Gilbert's Uses*, by *Sugden*, 296 n. (10); *Sugden on Powers*, Ch. I. sect. iii. 7th ed.

*title v. Gibbs*, 5 B. & C. 709; *Doe v. Prince*, 20 L. J. C. P. 223; *Sugden's note to Gilbert, Uses*, 163.

(e) *Haggerston v. Hanbury*, 5 B. & C. 101; 1 *Sanders, Uses*, 106. See *ante*, p. 38.

(d) *Roe v. Tranmar*, *Willes*, 682; *Lamb v. Archer*, 1 *Salk*, 225; *Good-*

Seisin for life. have ; so as if the use were limited to *cestui que use* and his heirs, and the estate out of which it was limited was but an estate for life, *cestui que use* can have no inheritance." His estate must determine with the life of the feoffee to uses (*f*).

Seisin in tail. So also, according to Bacon, "If I give land in tail by deed since the statute to A. to the use of B. and his heirs ; B. hath a fee simple determinable upon the death of A. without issue." But the later opinion seems to be that the statute does not apply to a seisin in tail. The difficulty arises from the seisin being appropriated to the heirs in tail by the statute *de donis*, and the tenant in tail consequently having no power over it, to execute the use, except by means of a recovery or disentailing assurance (*g*). A tenant in tail might raise a use upon his seisin co-extensive with his own life, as by a bargain and sale, which would be executed by the statute for an estate determinable upon his death (*h*).

Limits of operation of the statute.

Uses declared upon possession of terms of years.

The operation of the statute upon uses is restricted partly by the express terms of the statute, and partly by the judicial construction put upon the terms. The term *seised*, used in describing the condition of its operation, means invested with the legal possession for an estate of freehold, excluding possession for a term of years or chattel interest. Therefore, a use declared or raised upon a term of years is not executed by the statute and remains cognizable in equity only (*i*). It should be observed that a use for a term of years raised upon a seisin of freehold is within the statute and executed ; as in the bargain and sale for a year formerly made as the foundation of the conveyance by lease and release (*k*).

Uses limited to grantee of legal estate.

The statute is also restricted in terms to the cases of a person or persons being seised to the use of *another* person. According to Bacon, "The statute ought to be expounded that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertineney for the use to take effect by the common law." Thus, if a grant be made to A. and his heirs to the use of A. and his heirs, the use is not executed by the statute ; but the express declaration of use rebuts any resulting

(*f*) Bacon, Uses, 47 ; 1 Sanders, Uses, 106 ; but see Sugden's Gilbert on Uses, 127, n. (2).

(*g*) Bacon, Uses, 57, Rowe's ed. note (114) ; Gilbert, Uses by Sugden, 19 ; Lewin on Trusts, Introd. p. 6, n. (1) ; but see 1 Sanders, Uses, 87, in accord

with Bacon.

(*h*) *Seymour's Case*, 10 Co. 95 b.

(*i*) *Anon.*, Dyer, 369 a.

(*k*) *Heyward's Case*, 2 Co. 35 a ; *Barker v. Keate*, 2 Mod. 252. See *ante*, p. 39.

or implied use in the grantor, and the grantee remains in for his own use and benefit at the common law ; but if a grant be made to A. and his heirs to the use of A. for life or for years, with remainder to the use of B. and his heirs, A. is in of an estate for life or for years at the common law (by way of abridgment of estate in course of possession) and B. is in of the fee simple by the statute (*l*). But if a grant be made to A. and his heirs to the use of A. in tail, the use in tail is executed by the statute, being a new estate in favour of the issue, and no part of the legal estate conveyed by the grant ; so also, if tenant in fee simple covenants to stand seised to the use of himself in tail (*m*).

The case of many persons being jointly seised to the use of any of them is expressly provided for in the statute, and the uses are executed accordingly (*n*). Also in the case of a grant to A. and his heirs to the use of A. and B. and their heirs, the use is executed by the statute in A. and B. jointly (*o*).

Uses limited to some of joint grantees.

Uses limited to grantor and others.

The operation of the statute was also limited by judicial construction. The courts of law decided that the statute did not execute a use limited upon a use ; that is to say, upon a feoffment to A. and his heirs, to the use of B. and his heirs, to the use or in trust for C., the statute executed the use in B., and invested him with the legal possession ; but the operation of the statute was thereby exhausted, and the use limited to C. remained unexecuted (*p*).

Uses limited upon a use.

So, upon a bargain and sale to A., expressed to be to the use of B., the use raised in A. by the force of the consideration is executed by the statute, and the further use to B. remains unexecuted (*q*). The bargain and sale might be made to A. for a particular estate with remainder to B., and the use in remainder executed by the statute, as the consideration might be paid on account of the remainder ; but all the uses declared upon a bargain and sale must be within the consideration (*r*).

Upon a bargain and sale.

By the same rule, if the grant be to A. and his heirs to the use of A. and his heirs, (or to and to the use of A. and his heirs,) to the use of B. and his heirs, though A. is in by the common law

Use limited upon use in grantee.

(*l*) *Samme's Case*, 13 Co. 54 ; *Doe v. Prestwidge*, 4 M. & S. 178 ; *Orme's Case*, L. R. 8 C. P. 281 ; 42 L. J. C. P. 38. See *Peacock v. Eastland*, L. R. 10 Eq. 17 ; 39 L. J. C. 534 ; holding that grantee to his own use can disclaim the estate, which would be inoperative in the case of a mere grantee of the seisin to uses executed by the statute : *Re Dudson's Contract*, 8 Ch. D. 628 ; 47 L. J. C. 632 ; Bacon, *Uses*, 45 ; Sanders, *Uses*, 117 ; Sugd. Powers, 11.

(*m*) *Samme's Case*, 13 Co. 56 ; Bacon, *Uses*, 63 ; 1 Sanders, *Uses*, 92.

(*n*) See sect. 2, *ante*, p. 82.

(*o*) *Samme's Case*, 13 Co. 54.

(*p*) *Cooper v. Kynock*, L. R. 7 Ch. 398 ; 41 L. J. C. 296 ; 1 Sanders, *Uses*, 275.

(*q*) *Tyrrel's Case*, Dyer, 155 a ; see *Haggerston v. Hanbury*, 5 B. & C. 101.

(*r*) 2 Sanders, *Uses*, 56 ; see *ante*, pp. 85, 89.

and the use declared to him not executed by the statute, neither is the use declared to B. executed, because it is a use limited upon a use (*s*).

Use shifting  
previous use.

A shifting use is not a use upon a use in the above sense, because it takes effect in substitution for and instead of the use previously declared, and is then executed by the statute (*t*). And where the previous use is declared to the grantee himself so that it is not executed by the statute, and he remains in at common law, a shifting use in favour of another takes effect in substitution of the use limited to him, and is not a use limited upon a use, so as to be beyond the operation of the statute.—Thus, if a grant be made to A. and his heirs to the use of A. and his heirs, but in a certain event, as the marriage of A., to other uses, the latter uses are executed; so if, as frequently occurs, a conveyance be taken to A. and his heirs, to such uses as he shall appoint, and until and subject to such appointment to him and his heirs, the power of appointing uses is valid and the uses appointed under it will be executed (*u*).

Operation of  
statute  
avoided by  
limiting inter-  
mediate use.

Thus, it has been observed, the statute has had no other effect, as regards the jurisdiction of equity over uses, than to add three words to the conveyance, for the purpose of declaring an intermediate use. Further uses may then be declared beyond the reach of the statute, and within the cognizance of equity only (*x*).

Special or  
active trusts.

The trusts or confidences upon which a conveyance may be made are further distinguished into *special* and *general*;—sometimes distinguished as *active* and *passive*. Special or active trusts are created for such intents and purposes as require that the grantee should retain the legal estate in order to perform them;—as a trust to receive the rents and profits and pay them over in a prescribed manner, to pay taxes and outgoings, to do repairs, and the like;—a trust to execute an estate or settlement of the land, or to grant leases;—a trust to raise money by sale or mortgage. Trusts of this kind are not uses within the statute, and remain cognizable in equity only. General or passive trusts are such as are simply and absolutely for the benefit of another

Passive trusts.

(*s*) *Doe v. Passingham*, 6 B. & C. 305; *Cooper v. Kynock*, L. R. 7 Ch. 398; 41 L. J. C. 296.

(*t*) *Ante*, p. 88. See *Tippin v. Cusin*, Carth. 272.

(*u*) It has been objected that as a grantee to his own express use takes at common law, and not under the statute, a shifting use limited upon his seisin is void by the rule of common law against

shifting limitations (see *ante*, p. 33); but the objection has been overruled and the law settled as in the text. See Sugden, Powers, 140, 479; Burton Comp. (154); 1 Hayes Conv. App. ii. p. 459, 5th ed.

(*x*) *Per* Hardwicke, L. C., *Hopkins v. Hopkins*, 1 Atk. 591; *Cooper v. Kynock*, L. R. 7 Ch. 398; 41 L. J. C. 296.

person, importing, expressly or impliedly, that he may take the possession and profits and direct the disposal of the land, without any duties in the grantee requiring him to retain the legal estate. These are *uses* within the meaning of the statute (*y*). But where a use is executed in trustees by force of the statute, if the limitations are contained in a deed, the legal estate remains vested in them whether their duties are active or passive (*z*).

The Statute of Uses, 27 Hen. VIII., was passed before the Statute of Wills, 32 Hen. VIII., when there could be no devise to uses and no question of the application of the statute to wills. Accordingly it has been made a question whether the Statute of Uses applies to wills. At the same time expressions used by a testator have been regarded as "an index of intention" that the same construction with reference to the application of the Statute of Uses should be placed upon the limitations contained in his will as if they had occurred in a settlement of real estate, and effect will be given to this expression of intention (*a*).

Application of the Statute of Uses to wills.

Accordingly, a devise to A. and his heirs, to the use of B. and his heirs, vests the fee simple in B.; and on the other hand, a devise to A. and his heirs to the use of A. and his heirs, or a devise to the use of A. and his heirs, in trust for or for the use of B. and his heirs, vests the legal inheritance in A. in trust for B., and does not carry it on to B.; and these results follow from the presumed intention of the testator in using limitations of established effect with reference to the operation of the statute (*b*).

Upon the same principle a devise to A. and his heirs upon any special or active trust requiring the possession of the fee vests the legal estate in A. and prevents its passing over to the ultimate beneficiaries, because such trusts are not executed by the statute, and it is the manifest intention of the testator that they should not be. Here the question whether and how far the devisee named as trustee takes the legal estate depends upon the nature of the trust imposed, and how far it requires the vesting of the legal estate in order to carry it out (*c*).

Devise to trustees.

The Statute of Uses does not apply to the limitations of copyhold tenure, because there can be no *seisin* in the tenant, in the

Statute of Uses does not apply to copyholds.

(*y*) *Symson v. Turner*, 1 Eq. Cas. Ab. 383 marg.; Bro. Ab., tit. Feoff. al Uses, pl. 52; *White v. Parker*, 1 Bing. N. C. 593; 4 L. J. C. P. 178. See Bacon, Uses, 8, Tracts, 305; 1 Sanders, Uses, 253.  
(*z*) *Cooper v. Kynock*, L. R. 7 Ch. 398; 41 L. J. C. 296.  
(*a*) *Per* Jessel, M. R., *Baker v. White*,

L. R. 20 Eq. 166, 170; Butler's note to Co. Lit. 271, iii. 5; 1 Sanders, Uses, 250; Sugden, Powers, 146; 2 Jarman, Wills, 1137.

(*b*) 2 Jarman on Wills, 1137, and auth. there cited.

(*c*) *Silvester v. Wilson*, 2 T. R. 444; *Doe v. Biggs*, 2 Taunt. 109; *Barker v.*

strict meaning of the word, but only a tenancy at will under the freehold title, the seisin or freehold remaining in the lord. Also because transmutation of possession by operation of the statute without an admittance would be prejudicial to the interests of the lord, and inconsistent with the form of the tenure (*d*). Copyhold tenure has a system of uses peculiar to itself, which answers, for the most part, the same purpose of relaxing the strictness and inconvenience of common law limitations (*e*).

Devise of  
freehold and  
copyhold or  
leasehold  
combined  
upon trust.

It has been held that where freehold and copyhold lands are combined in one devise upon the same trusts, the Statute of Uses may apply to the freehold, although it cannot apply to the copyhold, and the legal title of the freehold and of the copyhold may accordingly devolve upon different persons (*f*); and a similar decision was come to where there was a combined gift of a freehold and chattels personal (*g*).

- Greenwood*, 4 M. & W. 421; 8 L. J. Ex. 166; 44 L. J. C. 651.  
 5; *Baker v. White*, L. R. 20 Eq. 166, (e) See *ante*, p. 63.  
 44 L. J. C. 65; *Van Gratten v. Foxwell*, (f) *Baker v. White*, L. R. 20 Eq.  
 [1897] A. C. 658; 66 L. J. Q. B. 745. 166; 44 L. J. C. 651.  
 See the Wills Act, 1837, ss. 30, 31. (g) *Re Brooke*, [1894] 1 Ch. 43; 63  
 (d) *Baker v. White*, L. R. 20 Eq. L. J. C. 159.



## CHAPTER IV.

### THE LAW OF TRUSTS AND EQUITABLE ESTATES.

#### Section I. The Nature and Origin of Trusts.

##### II. The Creation of Trusts.

##### III. Equitable Estates, and Estate and Office of Trustee.

#### SECTION I. THE NATURE AND ORIGIN OF TRUSTS.

Uses not executed by the statute—trustee and *cestui que trust*.

Trusts in equity—equitable seisin and estate—legal estate held subservient to the equitable estate.

Trusts at law—possession of *cestui que trust*.

Legal and equitable title—union of legal and equitable title—the Supreme Court of Judicature Act.

Trusts of copyholds.

The Statute of Uses was made with the object of converting uses into legal estates and so far as it operated was effectual; but the operation of the statute was restricted by the terms in which it was framed, and further by the judicial construction with which it was applied; also by the essential nature of the uses upon which it was intended to operate. It did not apply to uses declared upon terms of years; to uses declared upon a use; nor to special trusts and confidences requiring the grantee of the property to retain it for the active performance of his duties (a).

Trusts distinguished from uses.

The uses, trusts and confidences unexecuted by the statute continued to be subject to the jurisdiction of the Court of Chancery, and were administered upon the same general principles of equity as before the statute, though with a more extensive application. They became known as *trusts* in a special sense; the owner of the legal estate being distinguished as the *trustee* and the owner of the trust or beneficial interest as the *cestui que trust*. There is originally no essential difference of meaning in the words *use* and *trust*; the distinction is between those executed by the statute and those not executed, and in the different practice of the court respecting them before and since the statute (b).

(a) *Ante*, pp. 92 *et seq.*

(b) *Per* Lord Mansfield in *Burgess v.*

*Wheate*, 1 Eden, 217; and see *Doe v.*

*Collier*, 11 East, 377.

Trusts in equity.

The *cestui que trust* is entitled in equity to the possession and enjoyment of the land, or to receive the profits or proceeds of it, and to dispose of the same according to the terms of the trust. The result is sometimes expressed by the phrase that in the Court of Chancery "the equity is the land"; and the *cestui que trust* is said, by analogy, to be *seised* or *possessed* of an equitable estate (c).

Equitable estate and seisin.

The legal estate made subservient to the equitable estate.

The court of equity recognises the legal owner of the land and admits his title, but makes him wholly subservient to the equitable owner. It restrains him from exercising his legal rights for his own benefit, and compels him to hold, defend and dispose of the legal estate for the sole purpose of maintaining and realising the equitable estates and interests prescribed in the trust (d).

Right of *cestui que trust* to possession.

The *cestui que trust*, in general, may compel the trustee to put him in possession of the property to which he is beneficially entitled; but where the *cestui que trust* is not exclusively interested, and other parties have also claims, the court will exercise a discretion as to whether the possession shall remain with the trustee or be given to the *cestui que trust*, subject to such claims and with proper securities for them (e).

Trusts at law.

The jurisdiction of the courts of law, on the other hand, is confined to the legal ownership, at least in theory, and in regulating the rights of property takes no cognisance of any trust or equitable estate or interest.—In relation to the trustee or legal owner, the *cestui que trust*, if in possession, though in accordance with the trust, was in the position of a mere tenant at will (f);—and with regard to the legal title, as against strangers, the possession of the *cestui que trust* was the possession of the trustee (g).

Possession of *cestui que trust* at law.

Legal and equitable title.

There might thus be two different titles to the same land subsisting concurrently, the legal and the equitable title, regulated

(c) *Blake v. Bunbury*, 1 Ves. jun. 514; *Tidd v. Lister*, 5 Mad. 429; *Re Newen*, [1894] 2 Ch. 297; 63 L. J. C. 763. See per Lord Mansfield in *Burgess v. Wheate*, 1 Eden, 223, 226, and per Thurlow, L. C., in *Shrapnell v. Vernon*, 2 Bro. C. C. 268, 272. And see Lewin, *Trusts*, *Intro.*

(d) Lewin, *Trusts*, pp. 847 *et seq.*  
(e) *Blake v. Bunbury*, 1 Ves. jun. 514; *Tidd v. Lister*, 5 Mad. 429; *Baylies v. Baylies*, 1 Coll. 537; *Re Newen*, [1894] 2 Ch. 297; 63 L. J. C. 763.

(f) *Gurrard v. Tuck*, 8 C. B. 231.

(g) *Parker v. Carter*, 4 Hare, 400. Notwithstanding doctrines advanced by

Lord Mansfield in the last century, it was established until the Judicature Act, 1873, came into operation:—first, that a *cestui que trust* could not recover in ejectment in his own name, but must bring his action in the name of the trustee, who must be indemnified against the costs; secondly, that the trustee, as the tenant of the legal estate, might recover in ejectment from his own *cestui que trust*, who had no defence to the action at law, but must have recourse to an injunction in equity. Lewin, 851, 852.

respectively by the different systems of law and equity, but the title at law being held in subservience to the equitable title. A title to land is not complete unless it is fully recognised under both systems; and a purchaser under a contract of sale is entitled, in general, to have conveyed to him a good title both at law and in equity. Accordingly, upon a purchase of land, the abstract of title to be delivered by the vendor must show the legal title in the vendor, or in some person who is trustee for the vendor, or whom he may compel to concur in the sale (*h*);— and in an action at law by a purchaser against a vendor for not making a good title, the purchaser could recover his deposit unless the title were such as a court of equity would compel the purchaser to accept, and a title to the legal estate was not a sufficient answer to the action (*i*).

If the absolute equitable and legal titles unite in one person, the law alone is sufficient to maintain the rights of the owner, and equity does not, in general, interfere; in such case the equitable estate is said to merge in the legal and no longer exists; the beneficial use and enjoyment is referred wholly to the legal title (*k*). But the estates must be co-extensive, and merger may be prevented by the circumstances (*l*). The cases of a merger of an equitable estate in common in a legal estate in joint tenancy are not uniform (*m*).

Union of  
legal and  
equitable  
titles.

Where the legal estate is held simply upon trust for another absolutely, the *cestui que trust* (or his assignee) may be entitled in equity to have the legal estate conveyed to him, so as to invest the equitable interest with the legal estate. But when, as generally is the case in the creation of trusts, many persons are interested concurrently or successively, and each *cestui que trust* has only a partial interest, it is then no part of his right to have the legal estate, but it is essential that the legal estate should remain in the trustee in order to support the various equitable estates and interests (*n*).

Right of *cestui  
que trust* to  
the legal  
estate.

(*h*) *Esdaile v. Stephenson*, 6 Mad. 366; *Graham v. Oliver*, 3 Beav. 124; *Freeland v. Pearson*, L. R. 7 Eq. 246; *Cumberwell and South London Building Society v. Holloway*, 13 Ch. D. 754. See *Re Adams' Trustees and Frost's Contract*, [1907] 1 Ch. 695; 76 L. J. C. 408.

(*i*) *Jeakes v. White*, 6 Ex. 873; *Simmons v. Heseltine*, 5 C. B. N. S. 554; 28 L. J. C. P. 129; *Clarke v. Willott*, L. R. 7 Ex. 313; 41 L. J. Ex. 197. See *Soper v. Arnold*, 14 A. C. 429; 59 L. J. C. 214.

(*k*) *Selby v. Alston*, 3 Ves. 339; S. C. nom. *Goodright v. Wells*, Doug. 771.

(*l*) *Brydges v. Brydges*, 3 Ves. 120; *Merest v. James*, 6 Mad. 118. See *Whittle v. Henning*, 2 Ph. 731; 18 L. J. C. 51.

(*m*) *Axeling v. Knipe*, 19 Ves. 441; *Re Jackson*, 34 Ch. D. 732; *Re Selous*, [1901] 1 Ch. 921; 70 L. J. C. 402.

(*n*) *Saunders v. Necil*, 2 Vern. 428; *Goodson v. Ellison*, 3 Russ. 583; *Angier v. Stannard*, 3 M. & K. 566; *Willis v. Hiscoe*, 4 M. & Cr. 197; *Bond v. Walford*, 32 Ch. D. 238; 55 L. J. C. 667. See *Smith v. Snow*, 3 Mad. 10; *Delres v. Gray*, [1902] 2 Ch. 606; 71 L. J. C. 808.

Supreme  
Court of  
Judicature  
Act.

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), which came into operation 2 Nov., 1876, the jurisdictions of Law and Equity have been combined in the one court which is compelled to recognise equitable as well as legal rights, and where there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity now prevail (*o*).

Uses of  
copyholds.

The Statute of Uses, as already stated, does not apply to copyholds; and the uses of a surrender which serve to direct and limit the legal estate and possession under the peculiar forms and rules of customary tenure are not matter of equitable jurisdiction, nor are they within the scope of the Statute of Uses (*p*).

Trusts of  
copyholds.

But uses or trusts may be raised upon the legal possession to which admission is given according to the uses of the surrender, in like manner as upon the seisin of freehold tenure; and as the statute does not operate upon the possession of a customary tenant, such uses or trusts remain within the cognisance of equity only. Thus if a surrender be made to the use of A. to the use of or in trust for B., the legal estate is vested in A. by admittance, but he is trustee in equity for the use or trust declared in favour of B. who accordingly takes the equitable estate (*q*).

(*o*) As to the effect of this and the amending statutes, which only affect the remedies, and not the rights, of the parties, see "Annual Practice."

(*p*) *Ante*, p. 95.

(*q*) *Baker v. White*, L. R. 20 Eq. 166; 44 L. J. C. 651. See *Weaver v. Maule*, 2 M. & K. 343; *Gallard v. Hawkins*, 27 Ch. D. 298; 53 L. J. C. 834.

SECTION II. THE CREATION OF TRUSTS.

Trusts raised upon conveyance of the legal estate.

By declaration of trust—precatory trusts—evidence in writing required by the Statute of Frauds.

By constructive trust—from payment of consideration—purchase in name of wife or child—voluntary conveyances—conveyances obtained by fraud.

By resulting trust—from partial declaration of trust—from declaration which fails of effect.

Trusts raised without conveyance of the legal estate.

By declaration of trust—voluntary declaration of trust.

By constructive trust arising from contract—voluntary agreements—imperfect gifts—voluntary declarations of trust distinguished.

The system of trusts is formed upon the same general principles of equity as that of uses before the statute; but it has been much more largely developed, and in some points with different results. Like uses before the statute, trusts may be raised by express declaration, or by construction of equity; and they may be raised upon two conditions of the legal estate,—upon a conveyance of the legal estate, vesting it in another for the purpose of or subject to the trust—or without any such conveyance, by severing the equitable interest from the legal estate as previously vested, leaving the legal owner in the position of trustee (*a*).

Creation of trusts.

Upon a conveyance of the legal estate, a declaration of trust is sufficient to denote the intention of the conveyance, and to direct the course of the trust or equitable estate. If the legal conveyance is effectually made, the court of equity enforces the trust according to such direction (*b*).

Trusts raised upon conveyance of the legal estate,—by declaration of trust.

No technical language is required to declare a trust; any words or expressions, including precatory words (as words expressing a wish, request, recommendation, hope, or confidence), may be read as showing an intention to constitute a trust, if the trusts in other respects, as to the subject and object of the trust, be declared with sufficient certainty (*c*).

Construction of precatory words and expressions.

The Statute of Frauds, 29 Car. II. c. 3, s. 7, requires that all declarations or creations of trust of lands tenements or hereditaments shall be manifested and proved by some writing signed by

Evidence in writing required by the Statute of Frauds.

(*a*) See *ante*, p. 82; and see Lewin, ch. vi., on transmutation of possession.

(*b*) *Ellison v. Ellison*, 6 Ves. 656; 2 Wh. & T. L. C. Eq. 835.

(*c*) *Harding v. Glyn*, 1 Atk. 469; 2 Wh. & T. L. C. Eq. 335; *Comiskey v. Bowring Hanbury*, [1905] A. C. 84; 74 L. J. C. 263. See *post*, p. 105.

the party; with a saving of trusts arising or resulting by the implication or construction of law, as in the cases next mentioned (*d*). The statute applies to leaseholds and chattels real (*e*); but not to personal chattels, and as to these a declaration of trust may be made and proved without writing (*f*).

Writing subsequent to creation of trust.

The statute does not require that a trust shall be created by writing, but that it shall be manifested and proved by writing; and therefore the written declaration or evidence may be subsequent to the creation of the trust (*g*). The trust or disposition of the equitable interest, whether declared or constructive, is determined at the time of the conveyance made, and, as then constituted, cannot be altered or affected by subsequent declaration, except under an express power of revocation reserved in the declaration of trust (*h*).

Trusts proved by parol evidence.

Courts of equity will allow the trust to be proved by other means than writing, notwithstanding the Statute of Frauds, where it becomes necessary in the exercise of their jurisdiction to prevent fraud; as where a person accepts a conveyance or devise upon a trust, which he afterwards fraudulently refuses to execute, the trust may be established against him by parol evidence (*i*).

Constructive trust raised by payment of consideration.

Where a conveyance is made without any declaration of trust, Equity, as a general rule, raises a trust in the purchaser or the person who advances the consideration or purchase money; and the rule is applied whether the conveyance is taken in the name of a stranger, or in the name of a stranger and that of the purchaser, either jointly or in successive limitations. The trust thus raised is within the saving clause (sect. 8) of the Statute of Frauds, as being a trust arising by construction of law, and may be proved by parol evidence (*k*).

Trusts of copyhold raised by payment of fine or purchase money.

So with land of copyhold tenure, if a surrender or grant be made without any declaration of trust, but it appear that another person advanced the fine for admission upon the surrender, or the purchase money for the grant, the surrenderee or grantee will be presumed to hold upon a trust in his favour. Where admittance is given for several lives in succession, if one

(*d*) See ss. 7, 8, cited *ante*, p. 83.

(*e*) *Skett v. Whitmore*, 2 Freem. 280.

(*f*) *M'Fadden v. Jenkyns*, 1 Ha. 458.

On appeal, 1 Ph. 153; 12 L. J. C. 146.

(*g*) *Forster v. Hale*, 3 Ves. 696;

*Gardner v. Rowe*, 5 Russ. 258.

(*h*) See *Kilpin v. Kilpin*, 1 M. & K.

520, 531; *Stock v. M'Aray*, L. R. 15 Eq.

55; 42 L. J. C. 230; *Tucker v. Bennett*,

38 Ch. D. 1; 57 L. J. C. 507.

(*i*) *Haigh v. Kaye*, L. R. 7 Ch. 469;

41 L. J. C. 567; *Rochevoucauld v.*

*Boustead*, [1897] 1 Ch. 196; 66 L. J. C.

74.

(*k*) *Dyer v. Dyer*, 2 Cox, 92; 2 Wh.

& T. L. C. Eq. 803 and notes. See *ante*,

p. 83.

of the *cestui que vies* pay the whole price or purchase money, the trust results to him for the whole estate granted; and such trusts are the creation of equity and independent of the legal custom as to the distribution of the estate (*l*).

An exception to this rule occurs if the conveyance be taken in the name of the husband, wife, or a child of the purchaser; a presumption then arises from the relationship that the purchase was intended for the benefit or advancement of the husband, wife, or child. But such presumption may be rebutted by contemporary evidence of a contrary intention (*m*). So, where the conveyance was taken in the names of the trustees of a previous marriage settlement containing trusts for the benefit of the purchaser's wife and children, it was held to be subject to the trusts of the settlement for their benefit (*n*).

Purchase in name of wife or child.

So, if the surrender and admittance of copyholds be taken in the name of the child or of the wife of the purchaser, it imports an advancement for their benefit, and rebuts the resulting trust in favour of the purchaser (*o*).

Surrender of copyholds to use of wife or child of purchaser.

Where a conveyance is made without any declaration of trust, and without any payment of purchase money whence to infer a trust or disposal of the beneficial interest, it is presumed to be made for the benefit of the legal grantee. The rule is different with uses, as has been seen, for absence of consideration and of declared intention raises a resulting use in the grantor. Thus, a grant to A. and his heirs, without any declaration of use and without any consideration to raise a use, imports a resulting use in the grantor, which is executed by the statute and the estate remains in him as before; but a grant to A. and his heirs to the use of B. and his heirs conveys the legal and equitable interest to B. although there be no consideration given or express appropriation of the beneficial interest, and there is no resulting trust (*p*).

Voluntary conveyance.

But conveyances made without consideration, or *voluntary* conveyances, as they are called, may be fraudulent and void against creditors and subsequent purchasers, within the statutes 13 Eliz. c. 5 and 27 Eliz. c. 4, although binding upon the grantor and his representatives (*q*).

Voluntary conveyance void against creditors and purchasers.

(*l*) *Dyer v. Dyer*, 2 Cox, 92; 2 Wh. & T. L. C. Eq. 803; *Lewis v. Lane*, 2 M. & K. 449. See *ante*, p. 60.

(*m*) *Dyer v. Dyer*, 2 Cox, 92; 2 Wh. & T. L. C. Eq. 803; *Stock v. M'Avoy*, L. R. 15 Eq. 55; 42 L. J. C. 230; *Batstone v. Salter*, L. R. 10 Ch. 431; 44 L. J. C. 760; *Bennet v. Bennet*, 10 Ch. D. 474; *Mercier v. Mercier*, [1903] 2 Ch. 98; 72 L. J. C. 511.

(*n*) *Re Curteis Trust*, L. R. 14 Eq. 217; 41 L. J. C. 631.

(*o*) *Dyer v. Dyer*, 2 Cox, 92; 2 Wh. & T. L. C. Eq. 803.

(*p*) See *per* Hardwicke, L. C., *Lloyd v. Spillet*, 2 Atk. 148; *Denton v. Davies*, 18 Ves. 449; 1 Sanders, Uses, 352 *et seq.* See *ante*, p. 83.

(*q*) The latter statute has been amended by the Voluntary Conveyances

Conveyance  
obtained by  
fraud.

Voluntary  
conveyance  
for purpose  
which fails.

It may here be noticed that a conveyance, whether voluntary or not, obtained by fraud or undue influence, may be set aside in equity, and a reconveyance decreed; and a trust may thus result in equity in favour of the grantor (*r*). So, a voluntary conveyance made for a special purpose which fails of effect (not being an unlawful or illegal purpose), may entitle the grantor to call for a reconveyance, and raise a resulting trust in his favour (*s*). But the trusts are raised in these cases by the general jurisdiction of equity to prevent fraud, which is not within the scope of this treatise further than to call attention to it as a copious source of constructive trusts, distinct from those arising in the ordinary *bonâ fide* dealings with property.

Resulting  
trusts—from  
partial  
declaration of  
trust.

Where a conveyance is made to trustees, in that character, with a partial declaration of trust, or for the purpose of a trust which does not exhaust the beneficial interest, the interest undisposed of remains in the grantor as a resulting trust, like a resulting use before the statute. The presumption here is against the intention to pass the beneficial interest beyond the trust or purpose expressed (*t*).

Devise upon  
partial trust.

So with a devise of land by will, if it be declared to be upon trust for a particular purpose, as for the payment of debts, and no further trust is declared, it is taken to be for that purpose only and no other, and the unexhausted beneficial interest results to the heir or passes to the residuary devisee; but if the land be devised merely subject to a particular charge, as a charge of debts, the unexhausted beneficial interest remains with the devisee. Difficulty often occurs in construing wills in this respect, because, from the universally voluntary nature of devises, absence of consideration affords no guide to the intention, as it does in a conveyance *inter vivos* (*u*).

Resulting  
trust from  
declaration  
which fails of  
effect.

So, where the declaration of trust extends to the whole interest, but is void or incapable of taking effect or in the event fails of effect wholly or partially, there is a resulting trust for the grantor or his representatives (*x*). But if a conveyance, though

Act, 1893. See May, "Fraudulent Conveyances."

(*r*) *Huagenin v. Baseley*, 14 Ves. 273; 1 Wh. & T. L. C. Eq. 247. As to the omission of a power of revocation in a voluntary settlement, see *Hall v. Hall*, L. R. 8 Ch. 430; 42 L. J. C. 444.

(*s*) See *Cecil v. Butcher*, 2 J. & W. 565; *Symes v. Hughes*, L. R. 9 Eq. 475; 39 L. J. C. 304; *Haigh v. Kaye*, L. R. 7 Ch. 469; 41 L. J. C. 567; *Colquhoun v. Courtenay*, 43 L. J. C. 338.

(*t*) *Cuttington v. Fletcher*, 2 Atk. 155; *Northcote v. Carnegie*, 4 Drew. 587. There is no resulting trust in the case of gifts to charities as a general rule. See *Thetford School Case*, 8 Co. 130 *b*; *Ironmongers' Co. v. Att.-Gen.*, 10 Cl. & F. 908.

(*u*) *King v. Denison*, 1 V. & B. 260; *Re West*, [1900] 1 Ch. 84; 69 L. J. C. 71.

(*x*) *Ackroyd v. Smithson*, 1 Bro. C. C. 503; 1 Wh. & T. L. C. Eq. 372; *Tregonwell v. Sydenham*, 3 Dow. 194.



voluntary, be accompanied with a declaration, which is construed as precatory only, and which therefore fails of legal effect only as not intended to amount to an obligatory trust, the beneficial interest rests in the grantee, and there is no resulting trust (*y*).

Precatory declarations.

Trusts may be raised without a conveyance of the legal estate, by express declaration of trust;—a complete declaration of trust made by the owner of the legal estate is as efficient to raise the trust as if made upon a transfer of the legal estate; the trust is raised by force of the declaration, and does not require any consideration to support it by way of contract (*z*). “A declaration of trust is considered in a court of equity, as equivalent to a transfer of the legal interest in the court of law; and if the transaction by which the trust is created is complete, it will not be disturbed for want of consideration” (*a*). But if voluntary, it may be void against purchasers or creditors upon the same principles as a conveyance of the legal estate (*b*).

Trusts raised without conveyance of the legal estate,—by declaration of trust.

Voluntary declaration.

Any contract or agreement concerning an interest in land, which a court of equity would, if the limitations were valid, decree to be specifically performed, creates an equitable estate to the extent of the interest contracted for, and the party contracting to convey an interest in the land becomes a trustee of the land for the performance of the contract according to its terms and conditions so far as they are valid (*c*).

Trusts raised by contract.

A contract satisfying the statutory requirements of a bargain and sale, as being by deed indented and inrolled, might raise a use executed by the statute and at once convey a legal estate; “but,” it has been remarked, “even if those requisites were observed a contract could rarely so operate, for, as it ordinarily contemplates a future conveyance, to be preceded by an investigation of the title, its executory nature would negative that operation, no less than it prevents the vendor standing in the simple relation of a bare trustee to his *cestui que trust*.” “It raises a *qualified* trust in favour of the purchaser”—a trust for specific performance according to the terms of the contract (*d*).

Contract operating as bargain and sale.

(*y*) *Harding v. Glyn*, 1 Atk. 469; 2 Wh. & T. L. C. Eq. 335. As to the effect of precatory expressions in wills, see *ante*, p. 101.

(*z*) *Ellison v. Ellison*, 6 Ves. 656; 2 Wh. & T. L. C. Eq. 833, and notes.

(*a*) *Per* Lord Langdale, M. R., *Collinson v. Patrick*, 2 Keen, 123.

(*b*) *Ante*, p. 103.

(*c*) See *Rose v. Watson*, 10 H. L. C. 672; *Shaw v. Foster*, L. R. 5 H. L. 321; *L. & S. W. Ry. v. Gomm*, 20 Ch. D. 562; *Whitbread & Co. v. Watt*, [1902] 1 Ch. 835; 71 L. J. C. 424.

(*d*) 1 Hayes, Conv. 96. As to the trust arising upon a contract of sale, see *Shaw v. Foster*, L. R. 5 H. L. 321.

Voluntary  
agreement.

An agreement without consideration or voluntary agreement to transfer an estate or interest is not enforced in equity, and therefore raises no trust (*e*). Nor does it have any greater effect in raising a trust when made in form of a covenant under seal, or in favour of a wife or child or other relation (*f*); herein differing from a covenant to stand seised to uses, which raised a use upon a *good* consideration, *i.e.*, in favour of a wife or blood relation, without any valuable consideration to support it. An intended marriage is considered as a valuable consideration in support of an agreement, and for the purpose of raising a use or trust (*g*).

Imperfect  
gift.

The same principles apply to a gift or voluntary conveyance, if imperfect; equity will not assist or enforce it, and therefore no trust is raised in favour of the donee (*h*).

Voluntary  
declaration of  
trust dis-  
tinguished.

The distinction between a voluntary declaration of trust and a voluntary agreement to convey or an imperfect gift, the former being sufficient to raise a trust and the latter not, has been further explained as follows:—"A declaration of trust purports to be and is in form and substance a complete transaction, and the court need not look beyond the declaration of trust itself or inquire into its origin;—whereas an agreement or attempt to assign is in form and nature incomplete, and the origin of the transaction must be inquired into by the court; and where there is no consideration, the court, upon its general principles, cannot complete what it finds imperfect" (*i*). It may be added that by a declaration of trust the owner of the property intends to constitute himself a trustee; but in making an agreement or an attempt to convey he has no such intention, and if he becomes so, it is by construction of equity only (*k*).

(*e*) *Ellison v. Ellison*, 6 Ves. 656; 2 Wh. & T. L. C. Eq. 835, and notes.

(*f*) *Ellison v. Ellison*, *supra*; *Jefferys v. Jefferys*, Cr. & Ph. 138; *Burrows v. Greenwood*, 4 Y. & C. Ex. 251.

(*g*) *Fremont v. Dedere*, 1 P. Wms. 429; Gilbert, Uses, 47.

(*h*) *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 M. & Cr. 226; 5

L. J. C. 194.

(*i*) *Per Wigram, V. C., M'Fadden v. Jenkins*, 1 Hare, 458; 11 L. J. C. 281; affd. 1 Ph. 153; 12 L. J. C. 146. See *per Jessel, M. R., Richards v. Delbridge*, L. R. 18 Eq. 11; 43 L. J. C. 459.

(*k*) See *Antrobus v. Smith*, 12 Ves. 39; 5 L. J. C. 194; *Edwards v. Jones*, 1 M. & Cr. 226; *Jones v. Luck*, L. R. 1 Ch. 25; 35 L. J. C. 117.

SECTION III. § 1. EQUITABLE ESTATES, AND § 2. ESTATE AND OFFICE OF TRUSTEE.

§ 1. EQUITABLE ESTATES.

Equity follows the law—limitation of equitable estates—rules of tenure and doctrines peculiar to freehold.

Equitable estates of copyhold follow the custom—are not subject to fines and incidents of the legal tenancy—lord not bound by trusts—unless appearing on the rolls—custom to surrender upon trusts.

Equitable estates arising from constructive trusts.

Conveyance of equitable estates—writing required by the Statute of Frauds—equitable estates of copyhold.

Disposition by will and descent of equitable estates.

In the regulation of trusts, equity, in general, follows the law ; except where the different nature of the jurisdiction excludes any analogy (*a*). Equity follows the law.

Accordingly in the declaration of the trust or beneficial interest the limitations of the legal estate are followed. The same estates are allowed and the same language is generally used and receives the same construction as at law. Thus, the equitable estate may be limited in fee simple or in tail, for a term of life or for years, in possession and in remainder (*b*). The limitation of equitable estates.

It was formerly the practice for the Court of Chancery, in a case of doubtful construction of the limitations of an equitable estate, to send the case to a court of common law, with the question stated as if it had arisen upon an instrument operating at law, for the opinion of the court of law as to the construction of the words of the instrument ; and where the question could not be so moulded, the assistance of some of the judges might be called in. But even where a question as to the construction of an instrument operating at law arose in a suit in chancery, it was fully competent to the court to decide it upon its own authority, and it was not bound to give effect to the decision of the common law court upon a case stated (*c*). The Chancery Amendment Act, which gave the Court of Chancery full power to determine any questions of law necessary to be decided previously to the decision of the equitable question at issue, has Practice of stating cases for the opinion of court of law.  
The practice abolished.

(*a*) *Per* Lord Mansfield, in *Burgess v. Wheate*, 1 Eden, 223.

(*b*) 1 Sanders, Uses, 280 ; Butler's note to Co. Lit. 290 *b*, s. xiv. ; *Olivant v. Wright*, 9 Ch. D. 646 ; 47 L. J. C. 664.

(*c*) See *per* Bayley, J., *Houston v. Hughes*, 6 B. & C. 420 ; *Wilson v. Eden*, 11 Beav. 237 ; 14 Beav. 317 ; 16 Beav. 153 ; and see *per* Cranworth, L. C., *Roddam v. Morley*, 1 De G. & J. 1 ; 26 L. J. C. 444.

been superseded by the Judicature Act, 1873, which merged the chancery and common law courts into one Supreme Court, by which all former common law and equitable jurisdictions are concurrently administered.

Rules of tenure have no application to equitable estates.

Doctrines peculiar to freehold have no application.

But the rules of tenure have no application to the equitable estate; for the trustee is equally recognised to be the legal tenant, bound by the duties of tenure, in equity as at law. So, also, the legal doctrines concerning the seisin, requiring the tenancy to be always full, and excluding all future or shifting limitations except by way of remainder, as they are peculiar to the quality of freehold, have no application to the equitable estate; and an equitable estate may be limited to arise at a future time, or upon future or contingent events, or by appointment under a power, with all the freedom of springing and shifting uses, and in some respects even with greater freedom (*d*).

Equitable limitations of copyholds follow the custom.

Upon the same principle that equity follows the law, a declaration of trust of copyholds, as to the estates admissible, the limitation of estates, and construction of the limitations, follows and is regulated by the custom of the manor. Accordingly, the equitable interest cannot be limited for an estate tail in manors which have no special custom that the legal tenancy may be entailed (*e*).

Trust estate not subject to fines and other incidents of the legal tenancy. The lord's rights are not affected by trusts unless entered upon the rolls.

But the equitable estate in copyholds is independent of the claims of the lord incident to the legal tenure; as fines, fees, heriots, escheat, forfeiture and the like (*f*).

If a surrender is made upon express trusts, the lord is not bound to notice the trusts or to enter them upon the court rolls; nor is he bound by notice of any trusts which do not appear upon the rolls (*g*). If a surrender upon terms expressing or referring to trusts be accepted and enrolled, the lord may be bound by the trusts as against his own rights; and in case of an escheat or forfeiture of the tenancy, he would then hold as trustee, and might be compelled to regrant according to the trusts (*h*). It seems that there may be a custom in a manor to surrender lands upon trusts declared in the surrender, but without a custom the lord cannot be compelled to accept a surrender burdened with trusts (*i*).

(*d*) *Ante*, pp. 33, 88.

(*e*) *Pullen v. Middleton*, 9 Mod. 483.

(*f*) *R. v. Hendon*, 2 T. R. 484;

*Peachy v. Somerset (Duke)*, 1 Stra.

454; *Copestoke v. Hooper*, [1908] 2 Ch.

10; 77 L. J. Ch. 610.

(*g*) *Peachy v. Somerset (Duke)*, 1

Stra. 454.

(*h*) *Weaver v. Manle*, 2 Russ. & M.

97; *Gallard v. Hawkins*, 27 Ch. D. 298;

53 L. J. C. 834.

(*i*) *Snook v. Southwood*, 5 A. & E.

239; *Flack v. Downing Coll., Camb.*,

13 C. B. 945; 22 L. J. C. P. 229.

Equitable estates arising from constructive trusts without any express declaration follow the intention of the parties or are regulated by the circumstances of the case. Thus, a contract for the sale of land without expressing the interest intended is construed as referring to and importing the whole interest of the vendor, which he is therefore bound to convey; and the contract may thus create an equitable estate in fee simple without any technical words of limitation (*k*). So, a resulting trust carries all the equitable estate undisposed of, without any words of limitation (*l*).

Equitable estates arising by constructive trust.

In the transfer of equitable estates and interests by conveyance *inter vivos*, it is the ordinary practice to use the same formal assurances as are required in law for the corresponding legal interests, but such formal assurances are not absolutely necessary. Any instrument which expresses an intention to transfer the beneficial ownership to another is effective in equity; with a few exceptional occasions, as in the case of a tenant in tail, who is required to employ the same formalities as at law (*m*).

Conveyance of equitable estates.

By the Statute of Frauds, 29 Car. II. c. 3, s. 9, "all grants or assignments of any trust or confidence shall be in writing signed by the party granting or assigning the same" (*n*).

Writing required by Statute of Frauds.

Equitable estates and interests in copyholds may be created and assigned without surrender or admittance, or any of the forms appropriate to the legal tenancy, and without any other formality than is required for trusts in general. So, the equitable estate might have been devised without a surrender to the use of the will, before such surrenders were dispensed with by statute (*o*). But by the Fines and Recoveries Act, 1833, s. 50, a disposition of an equitable estate tail in copyhold land may be made either by surrender, or by a deed as therein provided (*p*).

Equitable estate in copyhold passes without surrender or admittance.

Equitable estate tail barred.

Equitable estates are devisable by will with the forms required for making a valid will (*q*). In case of intestacy an equitable estate of inheritance descends to the heir according to the legal rules of descent, including the variations of special customs to which the land is subject; while an equitable estate for a term

Devise of equitable estate. Descent of equitable estate.

(*k*) *Bower v. Cooper*, 2 Hare, 408. And see *ante*, p. 105, *post*, p. 221.

(*l*) *Ante*, p. 104.

(*m*) See Fines and Recoveries Act, 1833; *Carpenter v. Carpenter*, 1 Vern. 440; *North v. Way*, 1 Vern. 13; 1 Sanders, Uses, 280.

(*n*) *Ex p. Hall*, 10 Ch. D. 615; 48

L. J. Bk. 79.

(*o*) *Tuffnell v. Page*, 2 Atk. 37; see *ante*, pp. 54, 65.

(*p*) 3 & 4 Will. IV. c. 74, ss. 50—53; *Reg. v. Ingleton*, 8 Dowl. P. C. 693.

(*q*) Wills Act, 1837 (1 Vict. c. 26), s. 2; Lewin, Trusts, 908.

of years or chattel interest passes to the executor or administrator as personal estate; but, although a husband was entitled to an estate by the curtesy, a widow was not dowable out of an equitable fee in lands until the Dower Act (*r*).

## § 2. ESTATE AND OFFICE OF TRUSTEE.

Estate of trustee—trust follows the estate.

Purchaser for value without notice—purchaser without value—purchaser with notice.

Purchase under trust for sale—power of trustee to give receipts—statutory power.

Power to appoint new trustees—jurisdiction of Court of Chancery to supply the want of trustees—statutory power of court to appoint new trustees—statutory power without the aid of the court.

Liability of trustee to account—remuneration for time and services—expenses—employment of agents—indemnity.

Liability for breach of trust or negligence—default of agent—default of co-trustee.

Profits of trust—purchase of trust property by trustee—purchase of incumbrance—renewal of lease by trustee—purchase from *cestui que trust*—persons in fiduciary position.

Estate of trustee.

The land, remaining at law the property and at the disposal of the trustee, was formerly subject, in his hands, to all the incidents of legal ownership. In former times it passed by his conveyance or devise, or descended to his heir (*a*). Since 1881 a trust estate vested in a sole trustee devolves upon his personal representatives notwithstanding any testamentary disposition of the same except the property be of customary tenure, in which case it devolves upon the customary heir in the case of an intestacy or is transferred to the devisee if devised (*b*). Since 1882 a tenant for life of settled land may dispose of and convey the property settled without the concurrence of the trustees in the conveyance, but there is nothing in the Settled Land Acts, 1882 to 1890, to prevent a purchaser taking a conveyance of the legal estate from the trustees of the settlement.

The trust follows the legal estate.

But the trust or equitable title is, for the most part, independent of the casualties affecting the legal ownership, and, as a general rule, follows and attaches upon the land through all the devolutions of the legal title. All persons who take through

(*r*) *Watts v. Ball*, 1 P. Wms. 108; *Norfolk (Duke) v. Hall*, 1 Vern. 163; *Forder v. Wade*, 4 Bro. C. C. 521. And see *Banks v. Sutton*, 2 P. Wms. at p. 713.

(*a*) *Lewin, Trusts*, 241 *et seq.*

(*b*) *Conveyancing and Law of Property Act*, 1881, s. 30; *Copyholds Act*, 1894, s. 88.

or under the trustee, as his grantee (except a purchaser for value without notice of the trust), devisee, heir, executor or administrator, are equally bound by the trust (c).

Also creditors of the trustee, obtaining execution against the property held in trust in exercise of their legal right, would be restrained in equity, or would themselves be declared to be trustees (d). And the Bankruptcy Act, 1883, has confirmed the old rule that a trustee in bankruptcy has no claim against property held by the bankrupt upon trusts (e).

An exception occurs with a purchaser acquiring the legal estate from the trustee for a valuable consideration and without notice of the trust. The parties having an equal claim to the assistance of the court, it remains neutral, and the purchaser retains the beneficial enjoyment which a court of law would have adjudged to the owner of the legal estate. In the result the trust is thereby displaced and extinguished as to the land, and the former equitable owner is compensated by being allowed to follow the proceeds realised by a breach of trust, and a personal remedy against the trustee for any wrongful act (f).

Purchaser for value without notice of the trust.

The purchaser for value without notice can convey a good title, discharged of the trust, even to a purchaser with notice, except to the trustee who committed the breach of trust; in whose hands the land, though purchased for value, would be restored to the trust, in order to meet his original breach of trust (g).

Purchaser with notice from purchaser without notice.

A purchaser, or person acquiring the trust property from a trustee, without giving any value or consideration for it, as by a voluntary gift or devise, is charged with the trust and all equities affecting the property to the same extent as the trustee from whom he took, whether he had notice of the trust or not (h).

Purchaser without value.

A purchaser taking the trust property from a trustee with notice of the trust, though he paid full value for it, is subject to the trust; but if he paid value, it will be presumed that he had no notice, and the onus of proving notice will lie upon the party

Purchaser with notice.

(c) *Basset v. Noseworthy*, Rep. t. Finch, 102; 2 Wh. & T. L. C. Eq. 150.

(d) 1 Sanders, Uses, 390; Lewin, 202.

(e) Bankruptcy Act, 1883, s. 44 (1). See *Bennet v. Davis*, 2 P. Wms. 315.

(f) *Basset v. Noseworthy*, Rep. t. Finch, 102; 2 Wh. & T. L. C. Eq. 150; *Bailey v. Barnes*, [1894] 1 Ch. 43; 63 L. J. C. 73; *Taylor v. London and County Bank*, [1901] 2 Ch. 231;

70 L. J. C. 477. See Lewin, Trusts, 1074.

(g) *Lowther v. Carleton*, Cas. t. Talb. 186; *Sweet v. Southcote*, 2 Bro. C. C. 66; *Bovey v. Smith*, 1 Vern. 60, 84, 144. See *Boles and British Land Co.'s Cont.*, [1902] 1 Ch. 244; *Delves v. Gray*, [1902] 2 Ch. 606; 71 L. J. C. 808.

(h) *Huguenin v. Baseley*, 14 Ves. 273; 1 Wh. & T. L. C. Eq. 247.

alleging it against him (*i*). Notice received before paying the purchase money, or taking a conveyance of the legal estate, is sufficient to charge a purchaser with the trust, though he had no notice at the time of contracting for the purchase (*k*).

Purchase  
under trust of  
sale.

Implied  
power to give  
receipt for  
purchase  
money

Express  
power to give  
receipt.

Statutory  
power to  
give receipts.

Where the property was sold and conveyed by the trustee in execution of the trust, a purchaser with notice was so far bound by the trust, according to the general rule, that he became responsible for the sale being a proper one, and for the proper application of the purchase money; upon the principle that the *cestui que trust*, as being the equitable owner, alone could discharge him. But an exception was made with trusts for general purposes, which the purchaser had no means of inquiring into, as a trust to sell for the payment of debts generally, or for the payment of debts and legacies, or other kinds of trust which imply the power of selling the property discharged of the trust. Trusts for the payment of specified debts, or of legacies only, are within the general rule (*l*). Hence trusts requiring a sale or disposal of the property, in order to facilitate the execution of the trust, were usually framed with an express power of giving receipts to the purchaser, and discharging him from the obligation of seeing to the proper application of the purchase money. The purchaser was then discharged from all responsibility upon payment of the money to the trustees, and obtaining their receipts; for the equitable owners are bound by the terms and conditions of the trust. Such a clause, however, does not exempt the purchaser from the consequences of the power of sale not being duly exercised, upon a proper occasion and in a proper manner (*n*); and it may happen that notwithstanding such clause, the power is made conditional, as to its due execution, upon the proper application of the money (*n*).

It is now provided by sec. 20 of the Trustee Act, 1893 (which replaces and extends a series of earlier enactments to the same effect), that "the receipt in writing of any trustee for any money, securities, or other personal property or effects payable,

(*i*) *Le Nere v. Le Nere*, Amb. 436; 2 Wh. & T. L. C. Eq. 175; *Corser v. Cartwright*, L. R. 7 H. L. 731. See R. S. C. 1883, O. 19, r. 23.

(*k*) *Tourville v. Naish*, 3 P. Wms. 307; *Jackson v. Rowe*, 4 Russ. 514; *Bailey v. Barnes*, [1894] 1 Ch. 43; *Taylor v. London and County Bank*, [1901] 2 Ch. 231; 70 L. J. C. 477. See *Sharpe v. Fyfe*, L. R. 4 Ch. 35; *Life Int. and Rev. Securities (Corp.) v.*

*Hand in Hand Life and Fire Ins.*, [1898] 1 Ch. 230.

(*l*) *Elliot v. Merriman*, Barn. 78; 2 Wh. & T. L. C. Eq. 896; see *post*, pp. 200 *et seq.*

(*m*) *Dunn v. Flood*, 28 Ch. D. 586. See as to the actual decision, Trustee Act, 1893, s. 14.

(*n*) *Doe v. Martin*, 4 T. R. 39; *Hougham v. Sandys*, 2 Sim. 95; see Sugden, Powers, 852 *et seq.*



transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof" (o).

Powers of sale expressly given to trustees by any instrument may be exercised according to the provisions of sect. 13 and the ancillary sections of the same Act, unless those provisions are negatived or varied by the instrument.

Power was usually given to appoint new trustees and to convey the property to them as occasion required for the purpose of continuing the trust; such power being generally made exercisable with the consent of the *cestui que trust*. In the absence of such express power the trustee could only retire from the trust with the consent of all the beneficiaries, being *sui juris*, or an order of the court (p).

Power to appoint new trustees.

But the *cestui que trust* is entitled to have, at all times, proper trustees to hold the estate and support the trust, and the Court of Chancery has a general jurisdiction to execute trusts, and order conveyances of the trust property, which will be exercised as occasion requires. It being a maxim of equity that "a trust shall not fail for want of a trustee," the court will supply the want of them when necessary (q).

Jurisdiction of the Court of Chancery to supply the want of trustees.

The appointment of new trustees upon occasions of difficulty has been facilitated by statute. Sect. 25 of the Trustee Act, 1893 (the statute now in force), enacts, "The High Court may, whenever it is expedient to appoint a new trustee, or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees, either in substitution for, or in addition to any existing trustee or trustees, or although there is no existing trustee." The court may also make an order vesting the lands in the new trustees, which shall have the same effect as a conveyance made by the former trustees for the same purpose (r).

Statutory power of the court to appoint new trustees.

The court will not, in general, exercise the power given by this enactment, where there is an existing power of appointing new trustees, which the donee is willing to exercise (s).

(o) *Hockey v. Western*, [1898] 1 Ch. 350; 67 L. J. C. 166.

(p) See *Wilkinson v. Parry*, 4 Russ. 272; *Re Chetwynd's Settlement*, [1902] 1 Ch. 692; 71 L. J. C. 352.

(q) *Bennet v. Davis*, 2 P. Wms. 316; Eldon, L. C., *Brown v. Higgs*, 8 Ves. 570.

(r) As to the application of these enactments, see Lewin, *Trusts*, 817 *et seq.*; and Carson's *Real Prop. Statutes*, pp. 763 *et seq.*

(s) *Re Gadd*, 23 Ch. D. 134; 52 L. J. C. 396; *Re Higginbottom*, [1892] 3 Ch. 132; 62 L. J. C. 74.

The court may also make appointments of new trustees under the provisions of the Judicial Trustees Act, 1896, and the Public Trustee Act, 1907 (t).

Statutory power to appoint new trustees without the aid of the court.

A general statutory power of appointing new trustees, and of transferring to them all the powers and property of the trust, without the aid of the court, is given by the Trustee Act, 1893. The Act applies to instruments executed before, as well as after, the passing of the Act, and its application may be negatived or varied by the instrument creating the trust (u). Sect. 11 of the same statute empowers a trustee to retire from the trust if there are more than two trustees. This gives "quasi-legislative sanction" to the jurisdiction exercised by the Court of Chancery to discharge a trustee from the trust provided there be continuing trustees to administer the property (x).

Trustee bound to account.  
Claim for time and services.

A trustee may be compelled to give an account of the execution of the trust (y). He is not allowed to charge any remuneration for giving his time or services,—a rule which extends to all persons filling a fiduciary character, as executors, and the like; notwithstanding he may have rendered the services in a professional capacity. But the trust may expressly direct the allowance of a remuneration for time and services, professional or otherwise (z).

Claim for expenses,—  
of agents, etc.

A trustee may charge the expenses actually incurred by him in the protection and maintenance of the trust property and in the execution of the trust. He is entitled in a proper case, and where the nature of the case requires it, to appoint bailiffs, collectors of rents, solicitors, brokers, or the like (a). The appointment of these agents is the appointment of the trustee, for it is not obligatory upon him to appoint a person named in the instrument creating the trust (b). It follows that the claim of the agent for his remuneration is a claim against the trustee personally (c), but for this liability the trustee is entitled to reimbursement out of the trust estate and has a lien on it for the amount (d). Although the agent has no direct claim against the

(t) See Lewin, Trusts, pp. 685 *et seq.*; Carson, Real Prop. Statutes, 806.

(u) See Carson, Real Prop. Statutes, pp. 753 *et seq.*; Lewin, Trusts, pp. 788 *et seq.*

(x) *Re Chetwynd's Settlement*, [1902] 1 Ch. 692; 71 L. J. C. 352.

(y) See *Re Fish*, [1893] 2 Ch. 413; *Re Dartnall*, [1895] 1 Ch. 474; *Campbell v. Gillespie*, [1900] 1 Ch. 225; 69 L. J. C. 223.

(z) *Robinson v. Pett*, 3 P. Wms. 251;

2 Wh. & T. L. C. Eq. 606; *Re Fish*, [1893] 2 Ch. 413.

(a) See Lewin, Trusts, pp. 768 *et seq.*; Trustee Act, 1893, s. 17.

(b) *Shaw v. Lawless*, 5 Cl. & F. 529; *Finden v. Stephens*, 2 Ph. 142; 17 L. J. C. 342; *Foster v. Elsley*, 19 Ch. D. 518; 51 L. J. C. 275.

(c) *Stanier v. Evans*, 34 Ch. D. 470; 56 L. J. C. 581. See *Blyth v. Fladgate*, [1891] 1 Ch. 337; 60 L. J. C. 66.

(d) *Re Weall*, 42 Ch. D. 674; *Re*

trust estate, he might make his claim available, upon the doctrine of subrogation, to the same extent as that of the trustee(e). Where the trust fund is insufficient to satisfy the right of indemnity of the trustee, he is *primâ facie* entitled to be indemnified by his *cestui que trust* personally against any loss or liability arising in the proper execution of the trust(f).

Claim to indemnity.

A trustee is chargeable with loss occasioned by breach of trust or by negligence; and a trustee is bound to the same care on behalf of his *cestui que trust* as a reasonable person would take on behalf of himself(g).

Liability for breach of trust or negligence.

A trustee is not liable for the default, fraud, or negligence of agents employed by him of necessity, and in the ordinary and regular course of business, and without any personal negligence in the trustee; but he cannot delegate to them matters over which he ought to exercise discretion(h).

Default of agent.

But one of joint trustees is not chargeable with the neglect or default of another. Each is bound to join in all acts in execution of the trusts, and therefore upon a joint receipt he can be charged only with so much of the trust property or its produce as has come to his hands; unless fraud or negligence can be charged against him personally(i).

Liability for default of co-trustee.

It is a general principle of equity that a trustee shall not acquire to himself any profit from the trust. Whatever profit or benefit may accrue from the trust or trust property is impressed with the same trust, and must be accounted for to the *cestui que trust*(k).

Trustee must account for profits of trust.

Accordingly, a trustee who employs the trust property for any business or purpose of his own, while he is liable for all losses, may be compelled to account to the *cestui que trust* for all the profits actually made by such use of the property, or, at the option of the beneficiary, to interest at 5 per cent.(l).

Profits made by use of trust property.

*Fish*, [1893] 2 Ch. 413; Trustee Act, 1893, s. 24. See *Re Turner*, [1907] 2 Ch. 126, 539; 76 L. J. C. 492.

(e) See *Re Blundell*, 40 Ch. D. 370; 57 L. J. C. 730; *Re Raybould*, [1900] 1 Ch. 199; 69 L. J. C. 249; *Jennings v. Mather*, [1902] 1 K. B. 1; 70 L. J. K. B. 1032; *Re Turner*, [1907] 2 Ch. 126, 539; 76 L. J. C. 492.

(f) *Hardoon v. Belilios*, [1901] A. C. 118; 70 L. J. P. C. 9; *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139; 72 L. J. P. C. 31.

(g) *Jones v. Lewis*, 2 Ves. sen. 240; *Massey v. Banner*, 1 J. & W. 241; *Challen v. Shippam*, 4 Ha. 555; *Wiles v. Gresham*, 5 De G. M. & G. 770; 24

L. J. C. 264.

(h) *Speight v. Gaunt*, 9 App. Cas. 1; 53 L. J. C. 419; *Leuroyd v. Whiteley*, 12 App. Cas. 727; 57 L. J. C. 390; *Re Weall*, 42 Ch. D. 674; 58 L. J. C. 713; *Jobson v. Palmer*, [1893] 1 Ch. 71; 62 L. J. C. 180; *Shepherd v. Harris*, [1905] 2 Ch. 310; 74 L. J. C. 574.

(i) *Townley v. Sherborne*, Bridg. 35; 2 Wh. & T. L. C. Eq. 629; *Brice v. Stokes*, 11 Ves. 319; 2 Wh. & T. L. C. Eq. 633. See *Shepherd v. Harris*, [1905] 2 Ch. 310.

(k) *Keech v. Sandford*, Sel. Cas. Ch. 61; 2 Wh. & T. L. C. Eq. 693.

(l) *Burdick v. Garrick*, L. R. 5 Ch. 233; *Vyse v. Foster*, L. R. 8 Ch. 309;

Purchase of  
trust property  
by trustee.

Upon the same principle if a trustee for sale purchase the trust property for himself (unless by leave of the court), the sale may be set aside at the suit of the *cestui que trust*, who is entitled to fix the trustee with the price he proposed to give in the event of the property not fetching more upon a resale (*m*). If he has resold at an advance, he may be compelled to account for the excess above what he himself gave (*n*).

Purchase of  
incumbrance  
by trustee.

So, if a trustee buy in an incumbrance or charge upon the trust property for less than is due upon it, he will be deemed to hold it as trustee, with a lien or charge for his own benefit only to the extent of his purchase money (*o*).

Renewal of  
lease by  
trustee.

Upon the same principle the trustee of a renewable leasehold who takes a renewal in his own name, will be compelled to hold it upon the trusts of the former lease (*p*). A tenant for life, though not bound to renew leaseholds, if he does, is considered as a trustee, and holds the renewed interest upon the trusts of the settlement (*q*).

Purchase  
from *cestui  
que trust*.

A trustee may purchase the interest of his *cestui que trust*; but the burden of proving the fairness of the transaction, if it be called in question, lies upon him, which if he fail in doing, the sale may be set aside (*r*).

Persons in  
fiduciary  
position.

The doctrines above stated as to trustees apply generally to all persons standing in a fiduciary position relatively to the person by or on behalf of whom the property is sold, as executors, solicitors, or agents (*s*). But a tenant for life is not in a fiduciary position relatively to the remainderman, as regards a purchase from their trustees under a power of sale; although his own consent be required for an exercise of the power (*t*). And a mortgagee may buy from the mortgagor or from a prior mortgagee (*u*).

*Parker v. McKenna*, L. R. 10 Ch. 96; *Re Davis*, [1902] 2 Ch. 314; 71 L. J. C. 539. See *Know v. Gye*, L. R. 5 H. L. 656; 42 L. J. C. 234.

(*m*) *Fox v. Mackreth*, 2 Bro. C. C. 400; 2 Wh. & T. L. C. Eq. 709; *Ex p. Lacey*, 6 Ves. 625; *Delves v. Gray*, [1902] 2 Ch. 606; 71 L. J. C. 808; *Campbell v. Walker*, 5 Ves. 678.

(*n*) *Fox v. Mackreth*, 2 Bro. C. C. 400; 2 Wh. & T. L. C. Eq. 709; *Ex p. Morgan*, 12 Ves. 6.

(*o*) See *Williams v. Springfield*, 1 Vern. 476.

(*p*) *Keech v. Sandford*, Sel. Cas. Ch. 61; 2 Wh. & T. L. C. Eq. 693. See *Bevan v. Webb*, [1905] 1 Ch. 620; 74 L. J. C. 300; *Griffith v. Owen*, [1907]

1 Ch. 195; 76 L. J. C. 92.

(*q*) *Pickering v. Vowles*, 1 Bro. C. C. 197; *Giddings v. Giddings*, 3 Russ. 241. See *Re Biss*, [1903] 2 Ch. 40; 72 L. J. C. 473.

(*r*) *Fox v. Mackreth*, 2 Bro. C. C. 400; 2 Wh. & T. L. C. Eq. 709.

(*s*) *Ex p. Lacey*, 6 Ves. 625; *Dent v. Bennett*, 4 M. & Cr. 269. See *Guest v. Smythe*, L. R. 5 Ch. 551.

(*t*) *Howard v. Ducane*, T. & R. 81; *Dicconson v. Talbot*, L. R. 6 Ch. 32.

(*u*) *Knight v. Marjoribanks*, 2 Mac. & G. 10; *Kirkwood v. Thompson*, 2 De G. J. & S. 613; *Melbourne Bkg. Corp. v. Brougham*, 7 App. Cas. 307. See *Re Alison*, 11 Ch. D. 284.

## PART II.

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### ESTATES IN LAND.

#### CHAPTER I. The Limitation of Estates as to quantity.

#### II. The Limitation of Future Estates.

Property in land is divided into estates or interests measured by the quantity or duration of the use and enjoyment; and such estates, in regard to the time of commencement, may be either in possession or future.

Estates in land,—as to quantity,  
—as to time of commencement.

Accordingly this part is divided into two chapters treating respectively,—of the limitation of estates as to quantity or duration,—of the limitation of future estates (*a*).

Estates are defined and ascertained by the terms of limitation in which they are legally expressed and conveyed.—“It is the province of a limitation to mark the period or event for the commencement, and the time of continuance or duration of an estate, either by years, lives, or the series of heirs; also the determinable qualities of an estate; as for twenty-one years, if A. should so long live,” etc. (*b*).

The limitation of estates.

The use of words in limiting or defining an estate requires to be carefully distinguished in practice from the use of words in appropriating the estate to the purchaser, as the person is commonly called to whom the estate is destined. Many words, as “heirs,” “issue,” “children,” etc., are capable of a double import, as words of limitation and words of purchase; and they are often used ambiguously, especially in wills. The rules of construction occasioned by such cases of ambiguity form a considerable part of the law of limitation of estates, and will be found in the proper places in the following pages.

Distinction between words of limitation and words of purchase.

The word purchase (*perquisitio*) is applied in law to any lawful mode of acquiring property by the person's own act or agreement, as distinguished from acquisition by act of law, as descent, escheat and the like. A purchase in the above sense includes

Meaning of purchase.

(*a*) See *ante*, Introduction, pp. 5, 7.      (*b*) Preston's Shepp. Touch. 117.

acquisition not only under a contract of sale for a valuable consideration, but also by gift or without consideration, and by devise (*c*).

The various estates which may be limited or created in land may be conveniently treated in the order of their magnitude or duration, and accordingly will form the subjects of the sections into which the first chapter of this part is divided.

Variations of limitations.

But the terms of limitation vary in construction and effect as applied under the different systems of common law and customary law, of uses executed by the statute and trusts administered in equity. They also vary with the occasion of use, as employed in contracts, conveyances *inter vivos*, and wills. Therefore, to complete the view of estates, it is necessary to collect the rules and doctrines of limitation as they appear in the above systems and as they are applied in different instruments.

Standard rule of the common law.

The common law of freehold tenure is adopted, generally, as the standard rule of limitation and construction, and is followed in the other systems of estates, but with the modifications, if any, allowed or required by the quality of the estate and the occasion of application; and upon this principle the contents of the following sections are for the most part arranged. The rules there laid down may be considered of general application, unless qualified by the context, or unless some exception or modification be expressly noticed (*d*).

(*c*) Co. Lit. 18 *a*, *b*; 2 Blackst. Com. 241; see the meaning of the term discussed in *Askew v. Rooth*, L. R. 17 Eq. 426; 43 L. J. C. 368.

(*d*) As to customary estates, see *ante*, p. 52; as to limitations of uses, *ante*, p. 78; as to equitable estates, *ante*, p. 97.

## CHAPTER I.

### THE LIMITATION OF ESTATES AS TO QUANTITY.

- Section I. Fee simple.
- II. Fee tail.
- III. Estates for life.
- IV. Estates for years.
- V. Tenancy at will.
- VI. Conditional limitations and conditions.
- VII. Equitable estates and interests in land.

#### SECTION I. FEE SIMPLE.

- § 1. The limitation of a fee simple in conveyances.
- § 2. The limitation of a fee simple in wills.

#### § 1. THE LIMITATION OF A FEE SIMPLE IN CONVEYANCES.

Fee simple—limitation to “heirs” necessary to pass a fee—exceptions to the rule.

Rule in *Shelley's* case.

Limitation to “heirs” as purchasers—imports fee simple—descendible from ancestor—limitation to heirs of grantor.

Meaning of “heir” as word of purchase—presumptively means heir at law —“heir male”—“heir now living.”

A fee simple is the largest estate known to the law. The term *fee* here signifies inheritance, an estate that is heritable or descends to heirs; and *simple*, that it descends to the heirs general, without any restriction of the course of inheritance (*a*). Fee simple.

In conveyances at common law, a fee simple is limited in the terms “to A. and to his heirs,” the technical limitation to the “heirs” being necessary to make a fee or estate of inheritance. A conveyance “to A.,” or “to A. for ever,” or “to A. and his assigns for ever,” or the like, without the limitation “to his heirs,” gives only an estate for life, for want of the words of inheritance (*b*). By the Conveyancing and Law of Property Act, 1881 (*c*), s. 51, an estate in fee simple may be limited in a deed by using the words “‘in fee simple,’ without the word ‘heirs.’” The Limitation to “heirs” necessary to pass a fee.

(*a*) Co. Lit. 1 *a*, *b*, 2 *a*, 18 *a*; 2 Blackst. Com. 106; *ante*, p. 22.

(*b*) Co. Lit. 1 *a et seq.*

(*c*) 44 & 45 Vict. c. 41.

Statutory equivalents,

language of the section must be strictly followed, and a legal estate in fee simple will not pass by the use of the words "in fee," although it appears from expressions in the deed that the parties intended to convey that estate (*d*). The general rule applicable to the limitation of equitable estates in land is that equity follows the law, and equitable estates in land can, in general, only be limited in a deed by the use of the word "heirs" or its statutory equivalent; the three excepted cases being: (1) if the assurance is so made referentially as to show that the equitable estate in fee simple is to pass for an absolute interest and estate; or (2) if you find words that express that the grantee is to have all the estate and interest which the grantor had; or (3) if the grantee has, independently of the deed itself, an equitable right to the fee simple, as, *e.g.*, where he has paid the purchase-money for the property (*e*).

to A. *or* his heirs.

So, a grant to A. *or* his heirs conveys to A. only an estate for life, unless the context requires the disjunctive to be construed as a conjunctive (*f*); but a grant to A. *or* his heirs, to hold to him *and* his heirs is a fee (*g*).

to A. and his "heir."

A grant to A. and to his "heir," would, it seems, give a fee simple, the word "heir," though in the singular number, being construed as *nomen collectivum*, including the heir and his heirs (*h*).

Exceptions to the rule.

Some apparent exceptions may be found to the rule that a limitation to "heirs" is necessary to pass a fee,—as where the word "heirs" is included in the limitation by reference to another instrument containing it,—or by reference to a former limitation in the same instrument, as by the phrase *in formā prædictā* (*i*).

Exceptions by special custom.

Exceptions to the rule occur with copyholds in some manors where by special custom equivalent expressions are used; thus the words *sequels in right*, *sibi et suis*, *sibi et assignatis*, or *to him and his*, are in some instances the customary form of limiting an inheritance in copyhold (*j*).

(*d*) *Re Ethel & Mitchell's & Butler's Contract*, [1901] 1 Ch. 945; 70 L. J. C. 498.

(*e*) *Re Irwin*, [1904] 2 Ch. 752, and see *per* Buckley, J., at p. 764; 73 L. J. C. 832; *Re Tringham's Trusts*, [1904] 2 Ch. 487; 73 L. J. C. 698; *Re Oliver's Settlement*, [1905] 1 Ch. 191; 73 L. J. C. 62.

(*f*) *Mallory's Case*, 5 Co. 112 *a*; Co. Lit. 8 *b* and note (5).

(*g*) Hardwicke, L. C., *Wright v. Wright*, 1 Ves. sen. 411. But this is by force of the *habendum*: *Goodtitle v.*

*Gibbs*, 5 B. & C. 709.

(*h*) Hargrave's note (4) to Co. Lit. 8 *b*; *per* Eyre, C. J., *Dubber v. Trollope*, Amb. at p. 457.

(*i*) Co. Lit. 20 *b*: also in releases of certain kinds to a person already seised in fee, as by one joint tenant to another. Co. Lit. 9 *b*, 272 *b*, *et seq.* The word "heirs" as a word of purchase imports a fee without adding, and to their heirs. Co. Lit. 10 *a*.

(*j*) *Bunting v. Lepingwell*, 4 Co. 29 *b*.



The limitation "to A. for life" and the limitation "to A." being equivalent, a limitation "to A. for life and afterwards to his heirs," or "with remainder to his heirs," or any like expression importing that after the decease of A. his heirs are to take according to the rules of inheritance, is construed as equivalent to the limitation "to A. and to his heirs," and conveys to A. an estate in fee simple. This is the simplest application of the rule in *Shelley's case* (k). Rule in *Shelley's case*.

The word "heirs" or "heir" may be used, not as a word of limitation of estate, but as a word of purchase or designation of the purchaser; as, where a limitation is made to the "heirs" of a person without any preceding estate being given to the ancestor to which the word can be referred as a term of limitation, it must be taken as a term of purchase (l). Limitation to heirs as purchasers.

The construction of the limitations "to A. and to his heirs" or "to A. for life with remainder to his heirs" or to the like effect, is not altered by the fact of A. being dead at the time of making the limitations; they import a fee simple in A., and are then merely void of effect by reason of his non-existence, and his heirs take nothing (m). Limitation to A. and his heirs, A. being dead.

The word "heirs" used as a word of purchase, imports an estate in fee simple without any superadded words of limitation. According to Coke,—“where the remainder is limited to the right heirs of B. it need not be said, and to their heirs; for being plurally limited, it includeth a fee simple, yet it resteth but in one by purchase” (n). Limitation to "heirs" imports a fee simple without further limitation.

The word "heir" in the singular, as a designation of the purchaser, has not the same effect in a deed and requires further words of limitation to pass the fee (o).

By the Inheritance Act, 1833, s. 4, it is enacted "that when any person shall have acquired any land by purchase under a limitation to the heirs of any of his ancestors, contained in an assurance executed after 31 December, 1833,—such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land" (p). Descent to be traced from the ancestor.

(k) *Ante*, p. 24; the rule will be more fully stated and explained in treating of remainders, see *post*, Chap. II. Sect. I., p. 247.

(l) *Wills v. Palmer*, 5 Burr. 2615; *Roe v. Quartley*, 1 T. R. 630; *Cholmondeley v. Clinton*, 2 Mer. 171. See *Evans v. Evans*, [1892] 2 Ch. 173; 61 L. J. C. 456.

(m) *Goodright v. Wright*, 1 P. Wms. 397; *Doe v. Kett*, 4 T. R. 601; *Elliot v. Davenport*, 1 P. Wms. 83; Tud. L. C. Conv.

(n) Co. Lit. 10 a. See *post*, p. 122.  
(o) *Chambers v. Taylor*, 2 M. & Cr. 387. See *Evans v. Evans*, [1892] 2 Ch. 173; 61 L. J. C. 456.

(p) See *post*, p. 132.

Limitation to heirs of grantor.

A person could not by any common law assurance make his own heir a purchaser; the limitation of a remainder to his own heirs was inoperative, and he remained entitled as of his former estate. By the last-mentioned statute, s. 3, such limitation (in any assurance executed after 31 December, 1833) has the effect of vesting the estate in him as a purchaser and not as his former estate (*q*).

Meaning of "heir" as word of purchase.

The designation of a person as "heir" is necessarily uncertain until the death of the ancestor; for there can be no heir to a living person; as expressed in the maxim, *nemo est hæres viventis* (*r*). But if there be an assisting context, the word "heir" may be read as descriptive of an heir apparent or heir presumptive (*s*).

Heir presumptively means heir at law.

It presumptively means the heir at law, and not the customary heir, even where the land conveyed is subject to gavelkind or other customary rule of descent (*t*).

Heir qualified by description.  
Heir male.

Additional words of description may further particularise the heir intended as purchaser, as heir *male*, under which designation in a deed, it is doubtful whether the purchaser must answer the condition of being *the very* heir and a *male*; and in the case of a limitation to an heir *female*, whether a daughter can take if she be not also heir (*u*). The additional description may, however, qualify the meaning of the word "heir," as in the designation of "heir *now living*," which in the life of the ancestor can only mean the heir then apparent or presumptive (*x*). The purchaser under such restrictive descriptions of heir will take only an estate for life unless there be further words of limitation to give him the fee (*x*).

Heir now living.

(*q*) *Cholmondeley (Marq.) v. Clinton*, 2 B. & Ald. 625. See *ante*, p. 37; as to uses limited to the heir of the grantor, see *ante*, p. 89, and see *post*, Chap. II. Sect. II. "Future Uses."

(*r*) *Archer's Case*, 1 Co. 66 *b*; *Chaloner and Bowyer's Case*, 2 Leon. 70; Co. Lit. 8 *b*, 22 *b*. See *Re Parsons*, 45 Ch. D. 51; *Re Ellenborough*, [1903] 1 Ch. 697; 72 L. J. C. 218.

(*s*) *Darbishon v. Beaumont*, 1 P. Wms.

229; *Winter v. Perratt*, 9 Cl. & F. 606.

(*t*) *Garland v. Beverley*, 9 Ch. D. 213; 47 L. J. C. 711.

(*u*) See *Wills v. Palmer*, 4 Burr. 2615, as expl. Fearne, Cont. Rem. 45; *Winter v. Perratt*, 9 Cl. & F. 606; Viner, Ab. tit. Heir (G 3), (G 4), pp. 253 *et seq.*; Co. Lit. 24 *b*; Hargrave's note (3), *ib.*; Co. Lit. 164 *a*; Hargrave's note (2), *ib.*

(*x*) *Chambers v. Taylor*, 2 M. & Cr. 376; 6 L. J. C. 193.

## § 2. LIMITATION OF FEE SIMPLE IN WILLS.

Devise to "heirs" as word of limitation.

Rule in Shelley's case applied to wills.

Devise to "heirs" as devisees—imports fee simple—descendible from ancestor—devise to testator's own heir.

Meaning of "heir," as designation of devisee—"heir" with additional description—"heir" qualified by description.

Devise without words of limitation under the Wills Act, passes fee simple—not under the Wills Act, passes estate for life, unless contrary intention appear.

Devise without words of limitation, passing fee simple by apparent intention—devise of estate, property, etc.—in fee simple, for ever, etc.—devise of power of disposition—fee simple implied from devise over—implied from charge on devisee.

Devise to trustees passes fee simple, unless definite estate limited—estate limited by purposes of the trust.

A devise "to A. and to his heirs" receives the same construction as a limitation in like terms in a deed, and confers a fee simple (*a*). A devise to A. and to his "heir" (in the singular) has the like effect, the word "heir" being construed as *nomen collectivum* to include the heirs of such heir (*b*).

Devise to "heirs" as word of limitation, to A. and his heir ;

A devise "to A. or his heirs" is read as "to A. and his heirs," and gives a fee simple to A., and no substitutional gift to his heirs ; consequently, upon the death of A. in the lifetime of the testator the devise would lapse, and the heirs would take nothing (*c*).

to A. or his heirs ;

A devise "to A. and his heirs, during their lives" creates a fee simple, the words "during their lives" expressing merely the fact that the enjoyment of an estate of inheritance can only last during life (*d*).

to A. and his heirs during their lives.

The rule in *Shelley's* case applies to limitations in wills ; accordingly, if a devise be made to A. for life, and be followed by a devise by way of remainder to the heirs of A., the word "heirs" is construed as a word of limitation, and not as a designation of the devisee, and is referred to the estate of the ancestor (*e*).

Rule in *Shelley's* case.

(*a*) *Ante*, p. 119.

(*b*) *Blackburn v. Stables*, 2 V. & B. 367 ; *Britton v. Twining*, 3 Mer. 176.

(*c*) *Harris v. Davis*, 1 Coll. 416 ; *Greenway v. Greenway*, 2 D. F. & J. 128.

(*d*) *Doe v. Stenlake*, 12 East, 515 ; *Reece v. Steel*, 2 Sim. 233 ; *Hugo v.*

*Williams*, 41 L. J. C. 661 ; L. R. 14 Eq. 224.

(*e*) *Van Grutten v. Foxwell*, [1897] A. C. 658 ; 66 L. J. Q. B. 745. See *ante*, pp. 24, 121. See further as to the application of the rule to wills, *post*, Chap. II. Sect. III. "Future Devises."

Devise to  
"heirs" as  
devisees.

The word "heir" or "heirs" may be used as a word of purchase designating the devisee; as where there is no previous devise to the ancestor to which it can be referred as a term of limitation (*f*).

Imports fee  
simple.

A devise to the "heirs" of A. or to the "heir" of A. (in the singular) confers a fee simple without further words of limitation; "heir" being generally construed in a will as *nomen collectivum* embodying the heir and his heirs (*g*).

Descendible  
from the  
ancestor.

The Inheritance Act, 1833, s. 4, enacts, to the same effect as above stated with deeds, "that when any person shall have acquired any land by purchase under a limitation to the heirs of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after 31st December, 1833,—such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land" (*h*).

Devise to  
testator's own  
heir.

A devise to the testator's own heir or heirs of land which the heir would have taken by descent, was considered at common law to be merely descriptive of his title by descent, and the heir took the land in fee simple by descent and not as devisee. But by the statute 3 & 4 Will. IV. c. 106 (the Inheritance Act), s. 3, it was enacted "that when any land shall have been devised by any testator who shall die after the 31st December, 1833, to the heir or to the person who shall be heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent" (*i*).

Heir takes as  
devisee.

Meaning of  
"heir" as  
designating  
the devisee.

The word "heir" as used in a will to designate the devisee, is to be construed, in general, according to its strict technical meaning as the person who would take an inheritance of freehold tenure by the rules of common law; and that, though the land devised be of customary tenure with a different rule of descent (*k*).

Heir with  
additional  
description.

The word "heir" may be used to designate the devisee with some additional description, and in such case also the general

(*f*) *Archer's Case*, 1 Co. 66 *b*; *Willis v. Hiscox*, 4 M. & Cr. 197. See *ante*, p. 121.

(*g*) *Ante*, p. 121.

(*h*) *Ante*, p. 121; and see as to this enactment, *post*, p. 132.

(*i*) *Pihus v. Mitford*, 1 Vent. 372; *Wills v. Palmer*, 5 Burr. 2615. Whether under the new law the heir can disclaim the devise and rely upon his title by

descent, see *Doe v. Smyth*, 6 B. & C. 112; *Bickley v. Bickley*, L. R. 4 Eq. 216; 36 L. J. C. 817. And see 1 Hayes Conv. 315, 318, 5th ed.; *Robinson v. Knight*, 2 Eden, 155.

(*k*) *Thorpe v. Owen*, 2 Sm. & G. 90; *Sladen v. Sladen*, 2 J. & H. 369. See *Gurland v. Beverley*, 9 Ch. D. 213; 47 L. J. C. 711.

rule is that the word "heir" is to be construed in its strict legal sense, unless a clear intention to the contrary be manifested in the will:—Thus, a devise to the testator's "heir of his name" means the *very heir*, as well as of the name, and the devisee must satisfy the double description (*l*). So, a devise "to the right heirs of me (the testator) my son excepted," was construed as requiring the devisee to be the very heir of the testator and not his son, which, whilst the son was living, was impossible, and the devise was held void (*m*).

But the strict meaning of the word "heir," as a designation of the devisee, may be qualified by the additional words of description, in which case effect will be given to the intention manifested, and the person expressly or impliedly designated will take to the exclusion of the heir (*n*), as in the case of a devise to the "heir now living" of a person, which must be taken to mean the heir apparent or presumptive (*o*). So, a devise to the heirs of a woman, "as if she had continued sole and unmarried," excludes the lineal heirs (*p*).

Heir qualified by additional description.

Upon the same principle of conforming the construction to the intention, the words "heir male" or "heirs male" used in a will as designating the devisee are, in general, construed to mean the heir male of the body or heir in tail; and not the very heir being a male, according to the stricter construction required in a deed (*q*). So "heir male of the body" is construed to mean the heir in special tail male, that is, the heir traced through males, and not the heir of the body or in tail general, being a male (*r*).

"Heir male."

Heir male of the body.

Devises without words of limitation are subject to different rules, accordingly as they occur in wills which do or do not come under the operation of the Wills Act, 1837, which Act does not extend to any will made before 1st January, 1838 (sect. 34). In wills made before 1st January, 1838, a devise of freehold

Devise without words of limitation.

In wills made before 1838.

(*l*) *Wrightson v. Macaulay*, 14 M. & W. 214; *Pearce v. Vincent*, 2 Keen, 230.

(*m*) *Goodtitle v. Pugh*, Fearne, Cont. Rem. App. 573; 3 Bro. P. C. 454; 3 Mer. 348, described as "an extraordinary decision," in which "we trace but very faintly the anxiety generally imputed to judicial expositors of wills, *ut res magis valeat quon percat*." 2 Jarman, Wills, 922.

(*n*) *Beaulieu (Lord) v. Cardingham (Lord)*, Amb. 533; *Carne v. Roch*, 7 Bing. 226.

(*o*) *James v. Richardson*, 1 Vent. 334; T. Raym. 330; *Burchett v. Durdant*, 2 Vent. 311. See *Darbishon v. Beaumont*, 1 P. Wms. 229; 3 Bro. P. C. 60. See *ante*, p. 122.

(*p*) *Brookman v. Smith*, L. R. 6 Ex. 291; 7 Ex. 271; 40 L. J. Ex. 161; 41 L. J. Ex. 114.

(*q*) *Denn v. Slater*, 5 T. R. 335. See *ante*, p. 122. See a devise to "the first heir male" of A. and the various constructions made by the judges upon it, *Winter v. Perratt*, 9 Cl. & F. 606.

(*r*) See *post*, pp. 132, 137.

Under the  
Wills Act,  
1837.

land without technical words of limitation passes only an estate for life, unless there were a context from which it could be inferred that a larger estate was to be enjoyed (*s*). By sect. 28 of that Act, a devise without any words of limitation is to be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appear by the will (*t*).

Construction  
according to  
apparent in-  
tention.

But prior to the passing of the Wills Act, 1837, the want of technical words of limitation in a will might be supplied by other modes of expressing the intention that the devisee should take an estate in fee simple.

Words de-  
scriptive of  
the testator's  
interest.

A devise in terms which denoted the *estate and interest* of the testator in the land, and not merely the *land* itself, passed an estate of inheritance, without the word "heirs" or other expressions of limitation. Thus the words "inheritance" (*u*), "rents and profits" or "income" of land (*x*), "estate" (*y*), "property" (*z*), "my interest" (*a*), "my moiety" (*b*), "my part" (*c*), "my undivided quarter" (*d*), "reversion," or "remainder" (*e*) were sufficient to carry the fee simple of lands. But the words must occur in the operative part of the will, or be incorporated by reference, and may be modified by the context (*f*). A residuary gift has always received an enlarged construction, it being presumed that a testator does not desire to die intestate (*g*). Conversely, words primarily applicable to personal estate, as "effects" or "personal estates," might be applied to real estate, if there were a context showing that the testator employed the

(*s*) *Wild's Case*, 6 Co. 16 *b*; *Tud. L. C. Conv.* 361; *Peiton v. Banks*, 1 Vern. 65; *Poock v. Lincoln (Bp.)*, 3 Br. & B. 30; *Bowen v. Scovcroft*, 2 Y. & C. Ex. 640; *Saumarez v. Saumarez*, 4 M. & Cr. 331; *Hill v. Brown*, [1894] A. C. 125; 63 L. J. P. C. 46.

(*t*) The statute does not apply to the creation of a new subject of property out of the land; thus a devise of a rent or annuity charged upon the testator's real estate, without words of limitation, creates such charge only during the life of the devisee, and is not extended by the enactment beyond the terms of its creation: *Nichols v. Hawkes*, 10 Hare, 342; 22 L. J. C. 255.

(*u*) *Widlake v. Harding*, Hob. 2; *Trent v. Trent*, 1 Dow, 102.

(*x*) *Stewart v. Garnett*, 3 Sim. 398; *Charitable Donations (Commissioners) v. De Clifford*, 1 Dr. & War. 245. See *Munro v. Greener*, L. R. 14 Eq. 456.

(*y*) *Fletcher v. Smiton*, 2 T. R. 656;

*Doe v. Chapman*, 1 H. Bl. 223; *Randall v. Tutchin*, 6 Taunt. 410; *Longley v. Longley*, L. R. 13 Eq. 133; 41 L. J. C. 168.

(*z*) *Doe v. Langlands*, 14 East, 370; *Coltsman v. Coltsman*, L. R. 3 H. L. 121.

(*a*) *Cole v. Rawlinson*, 3 Bro. P. C. 7; *Re De la Hunt & Pennington*, 57 L. T. 874.

(*b*) *Doe v. Fawcett*, 3 C. B. 274.

(*c*) *Montgomery v. Montgomery*, 3 Jo. & L. 47.

(*d*) *Manning v. Taylor*, L. R. 1 Ex. 235.

(*e*) *Norton v. Ladd*, 1 Lutw. 755; *Bailis v. Gale*, 2 Ves. Sen. 48.

(*f*) *Doe v. Buckner*, 6 T. R. 610; *Hill v. Brown*, [1894] A. C. 125; 63 L. J. P. C. 46.

(*g*) *Saumarez v. Saumarez*, 4 M. & Cr. 331; *Kirby Smith v. Farnell*, [1903] 1 Ch. 483; 72 L. J. C. 468. See *Langdale, M. R., Lindgren v. Lindgren*, 9 Beav. 358, 361.

words in that sense (*h*). The words "tenements" and "hereditaments" were taken to refer to the subject of property only (*i*).

A devise of land to a person "in fee simple" or "for ever" imports a gift in fee simple (*k*). But the limitation "for ever" following a limitation to a special line of heirs, as an estate tail, imports no more than the indefinite continuance of that especial line of heirs, and has no effect in enlarging the estate (*l*).

A devise to a person in terms importing that he may dispose of the land at his absolute discretion will confer the fee simple, unless there be qualifying words showing that the testator intended to confer a power of appointment, or to create a trust for particular objects (*m*). But the addition of the words "to his assigns" after a devise to a person has, in general, no effect in enlarging the estate devised, for such words are taken to be merely descriptive of the power of alienation incident to the estate (*n*).

Upon a devise of land to a person without words of limitation, with a devise over if he dies under twenty-one or other specified age, it is implied that he takes the fee simple subject to the devise over. So where the devise over is,—if he die under age and without issue;—or if he die without issue living at his decease (*o*).

Where a devise is made to a person until a certain age, with a devise over in the event of his death under that age, there would in general be implied a gift to him absolutely in the other event not mentioned, namely, of his attaining that age, and he would take the fee simple subject to the devise over (*p*); but if the first devise be expressly limited to his life, the devise over only in the event of his dying under a certain age would raise no such implication, as the alternative event is provided for by his life interest (*q*).

Where lands are devised without words of limitation, but with

(*h*) *Doe v. Tufield*, 11 East, 246; *Doe v. Dring*, 2 M. & S. 448; *Torrington (Lord) v. Bowman*, 22 L. J. C. 236; *Hall v. Hall*, [1892] 1 Ch. 361; 61 L. J. C. 289.

(*i*) *Bailis v. Gale*, 2 Ves. sen. 48; *Moor v. Denn*, 2 Bos. & P. 247.

(*k*) Co. Lit. 9 b. See *Heath v. Heath*, 1 Bro. C. C. 147.

(*l*) *Davie v. Stevens*, Doug. 324; *Wright v. Vernon*, 2 Drew. 439; affd. 7 H. L. C. 35; 28 L. J. C. 198.

(*m*) *Whishon v. Clayton*, 1 Leon. 156; *Anon.*, 3 Leon. 71, pl. 108; *Watkins v. Williams*, 3 Mac. & G. 622; *Lambe v.*

*Eames*, L. R. 6 Ch. 597. See *Comiskey v. Bowring Hanbury*, [1905] A. C. 84; and see *post*, Chap. II. Sect. IV. "Powers."

(*n*) Co. Lit. 9 b. See *Brookman v. Smith*, L. R. 6 Ex. 291, 306.

(*o*) *Frogmorton v. Holyday*, 3 Burr. 1618; *Toovey v. Bassett*, 10 East, 460; *Re Harrison's Estate*, L. R. 5 Ch. 408. See *Bolton v. Bolton*, L. R. 5 Ex. 145; 39 L. J. Ex. 92.

(*p*) *Gardiner v. Stevens*, 30 L. J. C. 199; *Cropton v. Davies*, L. R. 4 C. P. 159.

(*q*) *Savage v. Tyers*, L. R. 7 Ch. 357.

Devise "in fee simple," or "for ever."

Devise of absolute power of disposition.

Devise to person and his assigns.

Devise in fee implied from devise over.

Devise in fee implied from

charge im-  
posed upon  
devisee.

a charge or duty imposed upon the devisee, as to pay a sum of money, or to pay debts or legacies, annuities, or with other burdensome obligation, the devisee takes the fee simple; because an estate for life being uncertain in duration, might not be sufficient to indemnify him against the payment or performance required of him (*r*). Where the land only is charged, so that the charge is excepted out of the subject of the devise and the devisee is to take nothing until it is satisfied, this rule does not apply, and the charge then affords no inference as to the estate or interest intended (*s*). An estate devised for life or in tail cannot be enlarged into a fee under the above rule (*t*).

Devise in  
trust.

Devises to trustees are now regulated, as to the estate taken, by the Wills Act, 1837, (which does not extend to any will made before 1 January, 1838,) with the result, it seems, that where the estate is not certainly defined, they presumptively take a fee simple. Sect. 30 enacts that a devise of real estate (other than a presentation to a church) to any trustee or executor shall be construed to pass "the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication." And sect. 31 enacts "That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

Prior to the above enactments a devise to trustees and their heirs in trust for a beneficiary to whom an estate was given without words of limitation was construed as conferring an equitable estate commensurate with the legal estate, namely, a fee; but where there was an express limitation of the equitable

(*r*) *Lloyd v. Jackson*, L. R. 2 Q. B. 269; *Pickwell v. Spencer*, L. R. 7 Ex. 105; 41 L. J. Ex. 73.

(*s*) *Doe v. Garlick*, 14 M. & W. 698; *Burton v. Powers*, 3 K. & J. 170; 26

L. J. C. 330.

(*t*) *Goodtitle v. Edmunds*, 7 T. R. 635; *Denn v. Slater*, 5 T. R. 535; *Doe v. Owens*, 1 B. & Ad. 318.



estate for life, a devise of the fee to trustees was restricted by implication to the continuance of the trust, unless the context required a different construction (*u*).

## SECTION II. FEE TAIL.

§ 1. The limitation of a fee tail in conveyances.

§ 2. The limitation of a fee tail in wills.

### § 1. THE LIMITATION OF A FEE TAIL IN CONVEYANCES.

Fee tail—general—special—male.

Words of inheritance necessary—heirs—issue, etc.

Words of procreation necessary—"heirs of the body"—"begotten" and "to be begotten"—"heirs" with limitation over upon failure of "heirs of the body"—statutory equivalents.

Limitation of estate in special tail—in tail male or female—limitation to "heirs male."

Rule in *Shelley's* case applied to limitations to "heirs of the body."

Limitation to heirs of the body as purchasers—rule in *Mandeville's* case—meaning of "heir male of the body" as words of purchase.

Limitation of estates tail in copyholds.

A fee tail is an estate of inheritance restricted in descent to a particular line of issue; there are different kinds of fee tail according to the differences of restriction:—a fee tail *general* is heritable by all the issue;—a fee tail *special* is heritable only by the issue by a specified person;—a fee tail *male* is restricted in descent to issue of that sex; and the descent must be traced wholly through males, so that the male issue of females are excluded, as well as all female issue;—so likewise with a fee tail female (*a*).

Thus, land may be limited to a man for an estate in tail male with remainder to him for an estate in tail female;—or it may be limited in tail male, with remainder to him in tail general;—and under the latter limitations all his issue may inherit; under the former limitations all the female issue of males and all the male issue of females would be excluded (*b*).

In conveyances at common law a fee tail general is limited by the words "to A. and to the heirs of his body," whether the limitation be in express words, or incorporated by words of reference.

Words of inheritance necessary to create estate tail—heirs.

(*u*) *Challenger v. Shepherd*, 8 T. R. 597; *Doe v. Nicholls*, 1 B. & C. 366; *Blagrove v. Blagrove*, 4 Ex. 550; 19 L. J. Ex. 414; *Baker v. White*, L. R. 20 Eq. 166; 44 L. J. C. 651; *Yarrow v. Knightly*, 8 Ch. D. 736; 47 L. J. C. 874. (*a*) Co. Lit. 18 *b et seq.*, 377 *a*. (*b*) Co. Lit. 25 *b*, 377 *a*. See *ante*, p. 28.

The limitation to the "heirs" is necessary to create an estate of inheritance whether in fee tail or in fee simple; "for every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without the word "heirs" (c). The limitation to A. and to the "heir" of his body would it seems have the same effect as if the word "heirs," in the plural, were used (d).

Limitation to issue, etc.

"If a man give lands or tenements to a man and to his seed, or to the issue or children of his body, he hath but an estate for life; for that there wanteth words of inheritance." So, where a man covenanted to stand seised to the use of his daughter and to the issue of her body, it was held that she had not an estate tail, but for life only (e).

Words of procreation—  
"heirs of the body."

And in the limitation of a fee tail it is necessary to add "of the body," in order to denote and restrict the inheritance by the issue; but those words may be supplied by other equivalent words of procreation. "If lands be given to a man, and to his heirs which he shall beget of his wife, or to a man *et hæredibus de carne sua*, or to a man *et hæredibus de se*; in all these cases these be good estates in tail, and yet these words *de corpore* are omitted" (f).

Heirs "begotten," or "to be begotten."

A limitation to a man and to his "heirs lawfully begotten," it is said, creates a fee simple for want of restriction to the issue, the words "lawfully begotten" not being referred to the ancestor; but to a man and the "heirs of him (*i.e.* by him) lawfully begotten" would create an estate tail (g). The construction of the words "heirs of the body" as words of limitation, is not restricted by adding the word "begotten" in the past tense, or "to be begotten" in the future tense (h).

Heirs of the body "begotten," or "to be begotten."

To "heirs" with limitation over upon failure of "heirs of the body."

The limitation "to A. and to his heirs," with a limitation over "upon failure of the heirs of the body of A.," or of his issue, to B. creates an estate tail in A.; the word heirs in the limitation to A. is construed according to the limitation over to mean "heirs of the body," and the limitation over operates as a remainder (i).

(c) Co. Lit. 20 a, 20 b. See *ante*, pp. 24, 119.

(d) Co. Lit. 22 a; *Richards v. Bergavenny (Lady)*, 2 Vern. 324.

(e) Co. Lit. 20 b; *Makepiece v. Fletcher*, Comyn, 457, and see *per* Kenyon, C. J., *Doe v. Collis*, 4 T. R. at p. 299. As to limitations to issue in wills, see *post*, p. 137.

(f) Co. Lit. 20 b; *Beresford's Case*,

7 Co. 41 a.

(g) Hargrave's note (2) to Co. Lit. 20 b. See *Mathews v. Gardiner*, 17 Beav. 254.

(h) *Doe v. Hallett*, 1 M. & S. 124; *Locke v. Dunlop*, 39 Ch. D. 387; 57 L. J. C. 1010.

(i) *Morgan v. Morgan*, L. R. 10 Eq. 99; 39 L. J. C. 493. As to the meaning of "issue," see *post*, p. 137.

The limitation to A. and to the heirs of his body by B. his wife, or to his heirs by B., creates an estate in special tail restricted to the issue of A. by B. ; and if B. be not his wife, it is an estate in special tail by reason of the possibility of her becoming so (*k*).

Limitation of estate in special tail.

The limitation "to A. and to his heirs males of his body" creates an estate tail male. So, a limitation to A. and to his heirs females of his body creates an estate tail female (*l*).

Limitation of estate in tail male, etc.

Gifts to a man and to the heirs of his body, or in tail general, and gifts in special tail to a man and his wife and the heirs of the bodies of the same are specified in the statute *De donis*, by which estates tail are constituted ; other estates tail as the above in tail male or female are taken to be so by the equity of the statute (*m*).

A limitation "to A. and to his heirs males," or "to A. and to his heirs females," creates an estate in fee simple, because it contains no restriction to a particular line of issue ; it is not limited by the gift of what body the issue male or female shall be. Inheritance by heirs general cannot be restricted to one sex, therefore the words males and females, having here no legal import, are rejected, and all the heirs, female as well as male, may inherit (*n*).

Limitation to A. and to his heirs male.

By sect. 51 of the Conveyancing and Law of Property Act, 1881, the words "in tail," "in tail male," or "in tail female" may now be substituted in a deed for technical expressions.

Statutory equivalents.

The rule in *Shelley's* case, already noticed in its application to limitations "to the heirs," applies also to limitations to an ancestor for life followed by limitations "to the heirs of his body," or "to the heirs male of his body" or other like terms, signifying that his issue are to take in the succession of an entail ; the words "heirs of the body," or other words of succession are then referred to the estate of the ancestor as words of limitation, vesting in him an estate tail (*o*).

To A. for life with remainder to heirs of his body.—Rule in *Shelley's* case.

But if an estate be limited in terms to the "heirs of the body" or "heirs male of the body," etc., of a person, without any preceding estate being given to the ancestor to which those terms can be referred as words of limitation, they must be taken as

Limitation to "heirs of the body," etc., as purchasers.

(*k*) Co. Lit. 20 *b et seq.*

(*l*) Co. Lit. 24 *b et seq.* See Hargrave's note (1) Co. Lit. 25 *a*.

(*m*) Co. Lit. 24 *a et seq.* As to the limits of the equity of the statute, see Co. Lit. 27 *a*.

(*n*) Co. Lit. 27 *a, b* ; *Doe v. Martyn*,

8 B. & C. 497. "For no man can institute a new kind of inheritance not allowed by law." Co. Lit. 13 *a*.

(*o*) See *ante*, pp. 24, 121 ; Fearne, C. R. 28 ; *Philips v. Brydges*, 3 Ves. 120, the like with limitations of equitable estates.

words of purchase, or a designation of the purchaser; they then convey an estate of inheritance in tail to the person answering the description of heir of the body or heir male of the body of the ancestor named without further words of limitation (*p*).

Rule in  
*Mandeville's*  
case.

By a rule of law laid down in *Mandeville's* case, the words have a further special effect in rendering such estate descendible as if the ancestor named had been the purchaser and had taken the estate tail (*q*). Thus, a devise in the terms "to the right heirs of my grandfather deceased by his second wife also deceased for ever" was held, according to the above rule, to create an estate in tail special descendible from the grandfather (*r*).

The Inheritance Act, 1833, s. 4, enacts "that when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors (in an assurance executed after 31st December, 1833,)—such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land." This enactment, so far as it extends to limitations to "heirs of the body," seems to be merely declaratory of the common law as laid down in *Mandeville's* case; it extends the same rule to limitations to "heirs," rendering the estate of the heir as purchaser descendible as if the ancestor had been the purchaser (*s*).

Meaning of  
"heir male of  
the body" as  
words of  
purchase.

The words "heir male of the body" or "heir female of the body" used in deeds as words of purchase mean the heir in special tail male or female, that is to say, the heir of the body traced through males or females exclusively (*t*).

General rule  
that heir  
means the  
very heir.

The doctrine laid down by Coke was that such expressions describing a purchaser should be construed (according to the general doctrine that "heir" means the *very heir*;) in the strict meaning of heir of the body, that is, heir in tail general, with the superadded condition of being a male or female; and accordingly he puts the case, "if A. have issue a son and a daughter, and a lease for life be made, the remainder to the heirs females of the body of A. A. dieth, the heir female (daughter?) can take nothing, because she is not heir; for she must be both heir and heir female, which she is not, because the brother is heir" (*u*).

(*p*) See *ante*, p. 121; Co. Lit. 26 *b*.  
(*q*) *Mandeville's Case*, Co. Lit. 26 *b*;  
Fearne, C. R. 44, 80. See *Allgood v.*  
*Blake*, L. R. 7 Ex. 339; L. R. 8 Ex.  
160; 42 L. J. Ex. 101.  
(*r*) *Vernon v. Wright*, 7 H. L. C. 35;

28 L. J. C. 198.

(*s*) *Moore v. Simkin*, 31 Ch. D. 95;  
55 L. J. C. 305. See *ante*, p. 121.

(*t*) See *ante*, p. 122.

(*u*) Co. Lit. 24 *a*.

But this doctrine is inconsistent with the well acknowledged rule in *Mandeville's* case as applied to the like expressions, and it has been conclusively rejected. Thus, under a limitation to the heirs female of the body of A., a daughter being the heir in tail female was held to be entitled as against the daughter of a deceased son who was very heir of the body and a female; and the objection that the former did not answer the description *in toto* was clearly overruled (*x*).

Not applied to heir male of the body.

The general rule has been broken in upon only with respect to words descriptive of heirs in tail; and the words "heirs male" or "heirs female" used in deeds to designate the purchaser are construed strictly to mean the person answering the double description of *very heir* and a male or female (*y*).

Copyholds in some manors may be entailed by special custom, and, subject to the custom, limitations to a person and to the heirs of his body or in like terms, would be construed to create estates tail corresponding to the estates created by the like limitations of lands of freehold tenure. Such limitations, if applied to copyholds in manors wherein there is no custom of entail, are construed according to the rules of common law, under which, as the statute *De donis* does not apply to lands of customary tenure, they create fees simple conditional upon issue (*z*). The trust or equitable estate of a copyhold follows the legal estate, and cannot be entailed where the legal estate cannot (*a*).

Limitation of estates tail in copyholds.

(*x*) *Goodtitle v. Burtenshaw*, Fearn, Cont. Rem. Ap. 570; and see *Wills v. Palmer*, 5 Burr. 2627; 1 W. Bl. 687; where the opinion of the court was expressed to the same effect as to the estate taken by purchase under the limitation in a deed to the "heir male of the body of A."

(*y*) *Ante*, p. 122; *per* Parke, B., *Wrightson v. Macaulay*, 14 M. & W. 231; 15 L. J. Ex. 121.

(*z*) *Doe v. Clark*, 5 B. & Ald. 458; *Doe v. Simpson*, 3 Man. & G. 929.

(*a*) *Pullen v. Middleton (Lord)*, 9 Mod. 483.

## § 2. THE LIMITATION OF A FEE TAIL IN WILLS.

§§ 1. Limitations to "heirs of the body," etc.

§§ 2. Limitations to "issue," "children," etc.

## §§ 1. LIMITATIONS TO "HEIRS OF THE BODY," ETC.

Devise to heirs of the body, etc., as words of limitation—to "heirs male"—to heirs with devise over upon failure of heirs of the body—to heirs with devise over to person capable of being heir.

Rule in *Shelley's* case—limitation to heirs of the body implied from devise over upon failure of such heirs.

Devise to "heirs of the body," etc., with additional words of limitation.

Devise to "heirs of the body," etc., with words of distribution superadded.

Devise to "heirs of the body," etc., as devisees—meaning of "heirs of the body" as devisees.

Devise to "heirs of the body," etc., as words of limitation.

To A. *or* the heirs of his body.

To A. and the "heir" of his body.

To A. and his heirs lawfully begotten.

To A. and his "heirs male," etc.

To A. and his heirs with devise over on failure of heirs of the body.

A devise by will to A. and "to the heirs of his body" creates an estate tail general in the devisee, the words "to the heirs of his body" being presumptively used as words of limitation with the same technical effect as in deeds (*a*). A devise to A. *or* the heirs of his body is construed with the same effect (*b*). A devise to A. and "to the heir of his body" (in the singular) presumptively has the same effect and gives an estate tail to A. (*c*).

A devise to A. and to his "heirs lawfully begotten" creates an estate tail, begotten *by him* being understood (*d*).

A devise to A. and his "heirs male" or "heirs female,"—a limitation which in a deed would create a fee simple,—primarily confers an estate in tail male or female, as the case may be; and the same construction would be put upon the phrase "heir male" or "heir female" in the singular (*e*).

A devise to A. and his heirs, with a devise over upon failure of the heirs of his body, creates an estate tail in A.; the word "heirs" in the prior devise being explained by the devise over to mean "heirs of the body" (*f*). So, a devise to A. and his heirs, with a devise over upon failure of his "heirs male," creates an

(*a*) See *ante*, p. 129.

(*b*) *Harris v. Davis*, 1 Coll. 416. See *Greenway v. Greenway*, 2 De G. F. & J. 128.

(*c*) *Dubber v. Trollope*, Ambl. 453; *White v. Collins*, Com. 301.

(*d*) *Nanfan v. Legh*, 7 Taunt. 85; *Good v. Good*, 7 E. & B. 295.

(*e*) *Hayes v. Foarde*, 2 W. Bl. 698; *Doe v. Coiyear*, 11 East, 548; *Leuthwaite v. Thompson*, 36 L. T. 910. See *Denn v. Slater*, 5 T. R. 335; *Doe v. Easley*, 1 C. M. & R. 823.

(*f*) *Tracy v. Glover*, cit. 3 Leon. 130. See as to a devise over upon failure of issue, *post*, p. 138.

estate tail ; the words " heirs male " in a will being construed, as above stated, to be equivalent to " heirs male of the body " (*g*).

A devise to A. and his heirs, and upon failure of heirs of A. to a person who is capable of being heir of A., creates an estate tail in A. ; but if the devise over upon failure of heirs of A. were to a stranger, it would be simply void as being a remainder limited after a fee simple (*h*).

To A. and his heirs, and upon failure of heirs, over.

The rule in *Shelley's* case is applied to wills, so that a devise to A. for life, followed by a devise to the heirs of his body, or his heirs male, or any equivalent limitation, creates an estate tail in A., by referring the limitations to the heirs to the preceding devise to the ancestor according to the rule (*i*). So a devise to A. for life followed by a devise to the " heir of his body," in the singular, is construed to create an estate tail in A. (*k*).

Rule in *Shelley's* case. Devise to A. for life followed by devise to " heirs of the body."

So, a devise to A. for life, with a devise over upon failure of the " heirs of his body " or the " heirs male of his body " or his " heirs male," creates an estate tail, general or male, in A. ; there is implied an intermediate limitation to the heirs of the body, or the heirs male of the body, which is referred to the preceding devise to A. under the rule in *Shelley's* case (*l*).

To A. for life with devise over upon failure of heirs of his body.

Where words of limitation which merely express the course of descent involved in the previous limitation to the heirs of the body are added to a limitation in tail, they are inoperative, according to the maxim *expressio eorum quæ tacite insunt nihil operatur*. Thus, a limitation to the heirs of their bodies would create an estate tail (*m*). So also words importing a fee simple in the heirs of the body ; as a devise to A., or to A. for life, and to the heirs of his body *and their heirs* limits an estate tail in A. ; or the addition of the words " for ever " will be referred to the indefinite continuance of the heritable issue before mentioned (*n*).

" Heirs of the body " with words of limitation superadded.

A devise to A. and to the heirs of his body " for their respective lives " is an estate tail, the limitation for their lives

Additional words of limitation rejected.

(*g*) *Denn v. Slater*, 5 T. R. 335.

(*h*) *Nottingham v. Jennings*, 1 P. Wms. 23 ; *Tyte v. Willis*, Cas. t. Talb. 1 ; *Ware v. Cunn*, 10 B. & C. 433 ; *Re Waugh*, [1903] 1 Ch. 744 ; 72 L. J. C. 586.

(*i*) *Shelley's Case*, 1 Co. 93 b ; Tud. L. C. Conv. 332 ; *Fetherston v. Fetherston*, 3 Cl. & F. 67 ; *Van Grutten v. Forwell*, [1897] A. C. 658 ; 66 L. J. Q. B. 745.

(*k*) *Dubber v. Trollope*, Ambl. 453.

(*l*) 1 Jarman, Wills, 520 ; Hawkins, Wills, 200. See *Grimson v. Downing*, 4 Drew. 125.

(*m*) *Roe v. Bedford*, 4 M. & S. 362 ; *Douglas v. Congreve*, 4 Bing. N. C. 1 ; 1 Beav. 59.

(*n*) *Nash v. Coates*, 3 B. & Ad. 839 ; *Vernon v. Wright*, 7 H. L. C. 35 ; 28 L. J. C. 198. See *Fearne*, Cont. Rem. 183, and see *per* Lord Mansfield, *Davie v. Stevens*, Dougl. 324.

expressing merely the necessary restriction of their successive enjoyment of the inheritance (*o*). And it seems that, generally speaking, additional words of limitation which in effect would alter the course of descent must be rejected as repugnant to the previous limitation to the heirs of the body (*p*).

Heirs of the body with words of distribution superadded.

Also, words of distribution superadded to the limitation to the heirs of the body importing that they are to take concurrently and not successively, as in a devise to A. and to the heirs of his body *in equal shares*, are rejected as being repugnant to the estate conveyed by that limitation (*q*).

Devise to "heirs of the body," etc.—as devisees.

But the words "heirs of the body" or "heirs male of the body" or "heirs male" or like words may be used in a will as words of purchase to designate the devisee; as where there is no devise to the ancestor to which they can be referred. And in such case they have the same effect as the like words in a deed in conveying an estate tail descendible as from the ancestor according to the rule in *Manderville's* case. And it seems that the words "heir of the body," or "heir male," in the singular number, used alone as words of purchase would operate as *nomina collectiva* to confer an estate tail with the like effect (*r*).

"Heir" of the body.

"Heir of the body" with words of limitation.

The words "heir of the body" or "heir male," in the singular number, used with the words of limitation superadded, become words of purchase designating the devisee, although there be a preceding devise to the ancestor, as where lands were devised to A. for life and after to the next heir male of A. and the heirs male of the body of such next heir male; or where lands were devised to A. for life, followed by a devise to the heir male of his body and the heirs of such heir male (*s*). And where lands were devised to A. for life, and after his death to the heir male of his body, *during the term of his life*, it was held that A. took an estate for life only and not an estate tail and that the heir male of his body took as devisee an estate for life (*t*).

To heir of the body for life.

"Heirs of the body" qualified by the context of the will.

The words "heirs of the body," "heirs male," or the like may also be made words of purchase by descriptions superadded,

(*o*) *Hugo v. Williams*, L. R. 14 Eq. 224; 41 L. J. C. 661. See *Pedder v. Hunt*, 18 Q. B. D. 565, and see *ante*, p. 23.

(*p*) *Pierson v. Tickers*, 5 East, 548; *Doe v. Goldsmith*, 7 Taunt. 209. See *Jordan v. Adams*, 9 C. B. N. S. 483; 30 L. J. C. P. 161.

(*q*) *Doe v. Featherstone*, 1 B. & Ad. 876; *Jesson v. Wright*, 2 Bligh. 1.

(*r*) *Manderville's Case*, Co. Lit. 26 b; *Fearne*, C. R., 82, n. (*p*); *Wills v. Palmer*, 5 Burr. 2615. See *Roe v. Quartley*, 1 T. R. 630.

(*s*) *Archer's Case*, 1 Co. 66; *Willis v. Hiscor*, 4 My. & Cr. 197; *Chamberlayne v. Chamberlayne*, 6 E. & B. 625; 25 L. J. Q. B. 187, 357.

(*t*) *White v. Collins*, Com. 289; *Pedder v. Hunt*, 18 Q. B. D. 565.



qualifying the meaning of the term heirs, or by expressions showing the intention to use it in a particular sense;—as heir male of the testator's name, heir of the body now living (*u*). And "heirs of the body" have been construed to mean children by reason of the will referring to the ancestor as their "father" (*x*).

The designation of the devisee as "heir male of the body," or "heir male" points to the heir male of the body in the course of entail, *i.e.*, the heir of the body traced through males, and not to the heir general of the body being a male (*y*).

Meaning of "heir male of the body," etc., as words of purchase.

## §§ 2. LIMITATIONS TO "ISSUE," "CHILDREN," ETC.

Devise to "issue," as word of limitation—to A. and his issue—to A. for life and after his death to his issue.

Devise to A. and his heirs with devise over upon failure of issue—to A. for life with devise over upon failure of issue—upon failure of issue at death—to testator's heir, upon failure of issue of A.

Meaning of phrases "die without issue," etc., in wills made before 1838—construction under the Wills Act, 1837.

Devise to "issue" as devisees—devise to issue with words of limitation and distribution superadded—meaning of "issue" as devisees—application of the rule in *Mandeville's* case.

Devise to "children" as word of limitation—rule in *Wild's* case—"sons" as word of limitation—"family."

The word "issue" in its general meaning extends to all lineal descendants indefinitely, without any reference to inheritance. The only mode of giving legal effect to the word in this indefinite extension, is to construe it as a word of limitation equivalent to the words "heirs of the body," which include all issue, but as taking successively by descent. Hence a devise to A. and "his issue" is so construed, and creates an estate tail general in A.; unless it appear from the context to be restricted to issue of a certain degree, as children, or to issue existing at a given time, as at the death of a person, or to have some other meaning inconsistent with an estate tail; in which cases it must be taken as a word of purchase designative of the devisees intended (*a*).

Devise to issue as word of limitation.

(*u*) *Burchett v. Durdant*, 2 Vent. 311; *Wrightson v. Macaulay*, 14 M. & W. 214; 15 L. J. Ex. 121; heir male of the body begotten of an European woman, see *Willis v. Hiscox*, 4 M. & C. 197, 201.

(*x*) *Jordan v. Adams*, 9 C. B. N. S. 483; 30 L. J. C. P. 161. See *Right v. Creber*, 5 B. & C. 866.

(*y*) *Doe v. Angell*, 9 Q. B. 328; 15 L. J. Q. B. 193; *Lywood v. Kimber*, 29

Beav. 38, S. C. nom. *Lywood v. Warwick*, 30 L. J. C. 507. Coke's rule to the contrary is, so far, not law. See *ante*, p. 132.

(*a*) See various definitions of the word "issue." *Lees v. Mosely*, 1 Y. & C. Ex. 549; *Slater v. Dangerfield*, 15 M. & W. 263; *Woodhouse v. Herrick*, 1 K. & J. 352; *Allgood v. Blake*, L. R. 7 Ex. 339; *Morgan v. Thomas*, 9 Q. B. D. 183; 51 L. J. Q. B. 556.

The construction is quite independent of the fact of there being or not being issue of the devisee living at the date of the will, or at any other period (*b*).

To A. and his issue living at his death.

A devise to A. and his issue *living at his death* was held to create an estate tail, because by such construction only could the issue become entitled, the devise purporting to be immediate. Had the devise been to A. for life, *with remainder* to the issue *living at his death*, they would have taken a contingent remainder by purchase as devisees (*c*).

To A. for life and after his death to his issue.

A devise to A., or to A. for life, followed by a devise in remainder or after his death "to his issue," gives A. an estate tail according to the rule in *Shelley's case* (*d*).

To A. and his heirs with devise over on failure of issue.

Devise over upon failure of issue of heir of testator.

A devise to A. and his heirs, with a devise over upon failure of the issue of A. *indefinitely*, that is, at any time, creates an estate tail in A.; the word heirs being explained by the devise over to mean issue or heirs of the body (*e*). Upon the same principle a devise over upon the indefinite failure of issue of the heir of the testator creates an estate tail in the heir, as it imports that the "inheritance is to be restricted to his issue" (*f*).

To A. for life with devise over upon failure of issue.

A devise to A., or to A. expressly for life, with a devise over upon the indefinite failure of his issue created an estate tail in A.; an intermediate limitation to the issue of A. being implied, and the devise over taking effect as a remainder (*g*).

Devise over upon failure of issue at death.

A devise over upon the failure of issue *at the death* of A. has no effect in enlarging his estate for life to an estate tail, because it accords with the determination of such an estate tail only in the event of A. dying without leaving issue, and not in the event of his leaving issue; but it may, perhaps, be held to imply a devise in the latter event to the issue living at his death, in the absence of any express disposition, otherwise the issue would be unprovided for and the property undisposed of (*h*). The circumstance of the issue being unprovided for is, at least, a ground for construing the devise over on failure of issue, if possible, to

(*b*) *Per Hale, C. J., King v. Melling*, 1 Vent. at p. 229. It is otherwise with a devise to A. and his children. See *Wild's Case*, *post*, p. 142.

(*c*) *University of Oxford v. Clifton*, 1 Eden, 473. See 2 Jarman, Wills, 1259, questioning the decision; and see *Wild's Case*, *post* p. 142.

(*d*) *Ante*, p. 135; *Roddy v. Fitzgerald*, 6 H. L. C. 823; *Pelham Clinton v. Newcastle (Duke)*, [1903] A. C. 111; 72

L. J. C. 424

(*e*) *Fitzgerald v. Leslie*, 3 Bro. P. C. 154; *Dansey v. Dansey*, 4 M. & S. 61.

(*f*) *Doe v. Walker*, 2 Man & G. 113.

(*g*) *Sunday's Case*, 9 Co. 127 *b*; *Machell v. Weeding*, 8 Sim. 4; *Doe v. Owens*, 1 B. & Ad. 318.

(*h*) *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121. See *per Hardwicke, L. C., Lethieullier v. Tracy*, 3 Atk. at pp. 784, 796; *Ex p. Rogers*, 2 Madd. 449.

mean an indefinite failure of issue, in order to imply an estate tail in A. (i).

It has been suggested that a devise, upon the indefinite failure of issue of A., to the heir apparent or presumptive of the testator would create an estate tail in A. by implication, in the absence of any express devise to him, upon the ground that, in the analogous case of a devise to the heir after the death of A., A. takes an estate for life by implication (k).

Devise to heir of testator on failure of issue of A.

In wills made before 1st January, 1838, such phrases as "if A. die without issue, or without having issue, or without leaving issue," or "for want or in default," or "on failure of issue of A.," presumptively import failure of issue indefinitely or at any period, and give ground for the above constructions (l).

Meaning of phrases "die without issue," etc., in wills before 1838.

The meaning of such phrases, however, as importing indefinite failure of issue is only presumptive, and yields to other expressions in the will restricting the meaning to a failure of issue at the death of the ancestor or other definite time (m).

Restrictive expressions,—failure at death.

Where the words in question follow a devise to children, sons, or a particular class of issue, they may be construed, according to the prior objects, as meaning "such" issue only (n).

Failure of "such" issue.

By the Wills Act, 1837, s. 29, (not extending to wills made before 1st January, 1838, see sect. 34,) it is enacted, "That in any devise or bequest of real or personal estate the words '*die without issue*,' or '*die without leaving issue*' or '*have no issue*,' or any words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of issue; unless a contrary intention shall appear by the will by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise: provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

Construction under the Wills Act.

(i) *Blinston v. Warburton*, 2 K. & J. 400; 25 L. J. C. 468.

(k) 1 Jarman, 520. See *Gardiner v. Sheldon*, Vaugh. 259.

(l) *Forth v. Chapman*, 1 P. Wms. 663; Tud. L. C. Conv. 371.

(m) *Porter v. Bradley*, 3 T. R. 143; *Doe v. Frost*, 3 B. & Ald. 546. See *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121.

(n) *Morgan v. Thomas*, 9 Q. B. D. 183; 51 L. J. C. 556; *Bowen v. Lewis*, 9 App. Cas. 890; 54 L. J. Q. B. 55.

Effect of  
enactment.

This enactment only applies to ambiguous expressions, and makes no change in the law, as to the implications arising from limitations over upon an *indefinite* failure of issue (o).

Devise to  
issue as  
devisees.

Where a devise is made to the "issue" of a person without any prior devise to the ancestor to which it can be referred as a term of limitation, the word "issue" must be taken as a word of purchase, designative of the devisee intended (p). And though there be a devise to the ancestor to which the limitation to the issue is presumptively to be referred, yet it may appear from the context of the will that the word "issue" is used with a meaning inconsistent with an estate tail, so that it must be taken to be a word of purchase, according to the following rules of construction.

"Issue" with  
words of  
limitation  
superadded.

A devise to A., or to A. for life, and after his death to his issue and the *heirs of the body of such issue*, or the *heirs of such issue*, creates an estate tail in A. notwithstanding the superadded words of limitation of estate; such words being taken as merely an amplification of the word "issue" and included in it, and therefore not inconsistent with an estate tail in the ancestor (q).

"Issue" with  
words of dis-  
tribution  
superadded.

But if to a devise in the above terms there be superadded words of distribution of estate importing that the issue are to take concurrently in shares or as *tenants in common*, and not in succession to the entirety, the word issue is then to be taken as a word of purchase designating the devisees; and this construction is not restricted or affected by a subsequent devise over upon failure of issue (which generally implies a preceding estate tail), for the devise over would be taken to refer to such issue only as would take under the prior devise as purchasers (r).

Words of  
distribution  
only.

And if there be no superadded words of limitation, but there be sufficient apparent intention for the issue to take the fee by implication (as is now constructively the case with all wills made on or after 1st January, 1838, by the operation of sect. 28 of the Wills Act, 1837), the words of distribution of estate require the word issue to be taken as a word of purchase (s).

(o) *Dawson v. Small*, L. R. 9 Ch. 651; *Re Edwards*, [1894] 3 Ch. 644.

(p) *Cook v. Cook*, 2 Vern. 545.

(q) *Roe v. Grew*, Wilm. 272; *Denn v. Puckey*, 5 T. R. 299; *Frank v. Stovin*, 3 East, 548. See *Parker v. Clarke*, 8 De G. M. & G. 104; *Morgan v. Thomas*, 9 Q. B. D. 643; 51 L. J. Q. B. 556.

(r) *Slater v. Dangerfield*, 15 M. & W. 273, and cases there cited. See *Clifford v. Koe*, 5 App. Cas. 447.

(s) *Bradley v. Cartwright*, L. R. 2

C. P. 511, 522; as to the devises in fee without the technical limitation to the heirs, see *ante*, p. 125. In *Bradley v. Cartwright* the fee was implied in the issue from a power of appointment amongst them, as to which see *post*, Chap. II. 'Powers.' Contrast the effect of words of limitation or distribution superadded to the words "heirs of the body," and the superior technical effect of the latter expression, as stated *ante*, pp. 133, 136.

Issue, as a word of purchase, *primâ facie* designates all descendants existing at the time or of the kind referred to; and they take concurrently *per capita* and not *per stirpes* (*t*). “And although the devise is to the issue begotten, that makes no difference; the words *begotten* and *to be begotten* are the same, as well upon the construction of wills as settlements, and take in all the issue after begotten” (*u*).

Meaning of issue as devisees.

The testator may give his own explanation of the meaning of the word issue by the context of the will;—as by a subsequent reference to the objects of the gift, as being children or sons; thus, in a will devising to the issue of A., “the eldest of such sons to be preferred before the youngest,” it was held that issue was explained by the will to mean sons (*x*);—so by reference to the objects of a prior gift to children, sons, etc., as “such issue,” the term issue may be restricted to the objects referred to (*y*);—so where there is a devise to a class of persons, with a devise over to the issue of any of the class dying before a certain period, and a direction that the issue should take the share of their *parents*, the reference to parents is held to restrict the meaning of issue to children; so where there is a devise to issue in such manner as their *father* or *parents* shall appoint (*z*).

Meaning explained by context of will.

By reference to children, etc.

By reference to parents.

The testator may show by the context of his will that he intends all the issue indefinitely to take in succession, as “heirs of the body,” and then the word issue, as a word of purchase, like *heirs of the body* so used, gives to the first heir in tail an estate tail descendible from the ancestor according to the rule in *Mandeville’s* case. Thus, where land was devised, after estates tail male to sons, “in default of such issue to all and every other the issue of my body,” with a devise over in default of such issue to the testator’s right heirs, it was held to give an estate tail in remainder to the heir in tail general at the death of the testator; such intention being inferred from an expressed wish of the testator “to prevent the dispersion of his estates,” and from the gift over in default of issue (*a*).

Issue to take in succession.

Rule in *Mandeville’s* case.

But the word “issue” alone will not bear this construction

(*t*) *Bradshaw v. Melling*, 19 Beav. 417. See also *Davenport v. Hanbury*, 3 Ves. 257; *Lywood v. Kimber*, 29 Beav. 38; S. C. nom. *Lywood v. Warwick*, 30 L. J. C. 507.

(*u*) *Cook v. Cook*, 2 Vernon, 545. See *ante*, p. 130.

(*x*) *Mandeville v. Lackey*, 3 Ridgw. P. C. 352. See *Roddy v. Fitzgerald*, 6 H. L. C. 823.

(*y*) *Doe v. Perryn*, 3 T. R. 484; *Doe*

*v. Royle*, 13 Q. B. 100; *Re Pollard’s Estate*, 3 De G. J. & S. 541; 32 L. J. C. 657; and the reference may be inferred without the use of the word “such.” *Goymour v. Pigge*, 7 Beav. 475; *Baker v. Tucker*, 3 H. L. C. 106.

(*z*) *Heasman v. Pearse*, L. R. 7 Ch. 275. See *Ralph v. Carrick*, 11 Ch. D. 873; 48 L. J. C. 801.

(*a*) *Allgood v. Blake*, L. R. 7 Ex. 339; 8 Ex. 160; 42 L. J. Ex. 101.

without aid from the context of the will. Accordingly, under a devise to the issue of J. S. simply, it was held that all the children and grandchildren (if any) took concurrently an estate for life (b). In wills now under the operation of the Wills Act, they would take the fee, which removes one argument in favour of the above construction.

Devise to  
"children"  
as word of  
limitation.

The word "children" is presumptively a word of purchase, meaning issue in the first degree; but it may be explained by the context of the will to be used as a word of limitation, meaning "heirs" or "heirs of the body" (c). Wherever a sentence in which the words "child" or "children" occur imports a succession of the inheritable blood, as in devises "to A. and his children in succession,"—"to A. for life and after his decease to his children and so on for ever,"—"unto my daughter M., to her and her children for ever," the gift will be construed to create estates tail (d).

Rule in  
*Wild's* case.

A rule of construction was laid down in *Wild's* case, that a devise to A. and his children, if A. has no child at the time of the devise, creates an estate tail in A.; the word children is to be taken as a word of limitation, because in that way only the children can take. But if A. has children, he and his children take jointly in fee, for life if the devise was made before the Wills Act, 1837 (e).

A devise to children as devisees *primâ facie* includes all the children in existence at the testator's death, and is not restricted to those existing at the time of making the devise; but, with reference to the rule in *Wild's* case, it has been decided that a child *en ventre sa mère* is not an existing child (f), but this ruling is questionable. It has been settled by the highest authority that a child is to be treated as in existence from the moment of conception for all purposes where it would be for his benefit, but not where it would be to his detriment (g). If treated as born, the child would take as joint tenant in fee; but if treated as unborn, the parent would take an estate tail, and have it in his power to defeat the expectation of the child as his successor.

(b) *Cook v. Cook*, 2 Vernon, 545.

(c) See *Doe v. Webber*, 1 B. & Ald. 713; *Byng v. Byng*, 10 H. L. C. 171; *Powell v. Davies*, 1 Beav. 532.

(d) *Broadhurst v. Morris*, 2 B. & Ad. 1; *Tyrone (Earl) v. Waterford (Marq.)*, 1 De G. F. & J. 613; *Trash v. Wood*, 4 M. & Cr. 324; *Roper v. Roper*, L. R. 3 C. P. 32; 37 L. J. C. P. 7; *Re Buckton*, [1907] 2 Ch. 406; 76 L. J. C.

584. See *Powell v. Davies*, 1 Beav. 532.

(e) *Wild's Case*, 6 Co. 17a; Tud. L. C. Conv. 361; *Roper v. Roper*, L. R. 3 C. P. 32; *Byng v. Byng*, 10 H. L. C. 171; 31 L. J. C. 470; *Clifford v. Koc*, 5 App. Cas. 447.

(f) *Roper v. Roper*, L. R. 3 C. P. 32; 37 L. J. C. P. 7.

(g) *Villar v. Gildbey*, [1907] A. C. 139; 76 L. J. C. 339.

If a devise be made to A., and after his decease to his children, or with remainder to his children, although he have no child at the time, yet every child which he shall have after, may take by way of remainder, for the intent appears that the children shall not take immediately, but after the decease of the parent (*h*).

The word "sons" or "son" is capable of being construed as a word of limitation, equivalent to "heirs male of the body," giving an estate tail male, in order to effectuate the manifest general intention of the will (*i*). Thus, a devise in the terms "to A. for life, and after his decease that the eldest son of A. should inherit the property during his life, and so on, the eldest son of the family to inherit the same for ever," was held to create an estate tail in A.; the words clearly indicating a series of inheritances and constituting words of limitation (*k*).

"Sons" or "son" as words of limitation.

A devise to A. and his "family" is capable of being construed as a limitation, conferring an estate in fee or an estate tail; but the meaning of the word "family" seems in all cases to depend upon the context of the will, and may be altogether void for uncertainty (*l*).

"Family."

The word "descendants" *primâ facie* means "heirs of the body," and is less flexible than the word "issue," and requires a stronger context to restrict its meaning as the equivalent of "children" (*m*).

"Descendants."

(*h*) *Wild's Case*, 6 Co. 17 *a*. See as to the construction of future limitations to children, *post*, Chap. II. 'Contingent Remainders,' and 'Executory Devises.'

(*i*) *Mellish v. Mellish*, 2 B. & C. 520; *Doc v. Garrod*, 2 B. & Ad. 87.

(*k*) *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93.

(*l*) *Counden v. Clerke*, Hob. 29;

*Wright v. Athyns*, 19 Ves. 299; G. Coop. 111; *Lucas v. Goldsmid*, 29 Beav. 657; 30 L. J. C. 935; *Lambe v. Eames*, L. R. 6 Ch. 597; *Burt v. Hellyar*, L. R. 14 Eq. 160; 41 L. J. C. 430.

(*m*) *Manno v. Greener*, L. R. 14 Eq. 456; *Ralph v. Carrick*, 11 Ch. D. 873; 48 L. J. C. 801.

## SECTION III. ESTATES FOR LIFE.

Estate for life—for life of the tenant—*pur autre vie*—for several lives—for joint lives—for lives of the tenant and others.

Limitation of estates for life—grant to A. without words of limitation—to A. for life without expressing whose life—lease for several lives—for joint lives.

Devise of land without words of limitation, under the Wills Act—in wills not under the Wills Act—devise for life by implication.

Occupancy of estate *pur autre vie*—limitation of estate *pur autre vie* to special occupant—to the heirs—to the heirs of the body—to the executor or administrator—occupancy by statute.

Occupancy of copyholds—special occupant by designation—by custom—by statute.

Discovery of death of persons on whose lives estates depend—presumption of death.

Estate for life of tenant, —*pur autre vie*.

An estate for life is limited for the term of the life either of the tenant himself or of another person. In the former case the tenant is commonly called tenant for life; in the latter case he is distinguished as tenant *pur autre vie* (a).

For several lives.

An estate may be limited for the lives of several persons named in the grant or lease, to continue until the death of the survivor; or an estate may be limited for the *joint* lives of several persons, in which event it determines upon the death of any of the persons named (b).

For lives of tenant himself and others.

An estate may be limited for the lives of the tenant himself and of another or others, and is then, in respect of the other life or lives, an estate *pur autre vie*. Coke specifies this as a third branch, in addition to the two branches into which Littleton, as above, divides tenant for life, viz., into tenant for term of his own life and into tenant for term of another man's life. "To this," he says, "may be added a third, viz., into an estate both for term of his own life, and for term of another man's life. As if a lease be made to A. to have to him for term of his own life and the lives of B. and C., for the lessee in this case hath but one freehold, which hath this limitation, during his own life and during the lives of two others. And herein is a diversity to be observed between several estates in several degrees, and one estate with several limitations. For, in the first, an estate for a man's own life is higher than for another man's life, but in the second it is not" (c).

(a) Lit. s. 56; Co. Lit. 41 b.

(b) *Brudnel's Case*, 5 Co. 9 a; *Rosse's Case*, 5 Co. 13 a; *Ite Amos*, [1891]

3 Ch. 159.

(c) Co. Lit. 41 b.



According to the technical doctrine here referred to, that as between several estates an estate for a man's own life is higher than for another man's life, an estate *pur autre vie* is extinguished or merged by surrender to a tenant for his own life; so a lease to a person for the life of another with remainder to the same person for his own life operates to merge the prior limitation, and is a lease for his own life only and not for several lives (*d*). But this doctrine, as Coke says above, does not prevent the creation of *one* estate in a person with the several connected limitations, *both* for his own life and the lives of others; and if he dies before the other persons on whose lives the estate depends, the estate continues, as in the ordinary case of an estate *pur autre vie* (*e*).

Doctrine that estate for a person's own life is greater than for life of another.

A grant or lease of land at common law, in a form sufficient to pass a freehold estate, made to a person without words of limitation, as "to A." or "to A. for ever," or "to A. and his assigns for ever," gives only an estate for life; the limitation "to his heirs," or the statutory equivalent, being necessary to make an estate of inheritance (*f*). A limitation in the above terms may be followed by a limitation of the remainder to B., or to B. and his heirs; and if there be no subsequent limitation, the reversion is left in the grantor (*g*).

Limitation of estate for life —grant to A. without words of limitation.

If "A., tenant in fee simple, makes a lease of lands to B. to have and to hold to B. for term of life, without mentioning for whose life it shall be, it shall be deemed for term of the life of the lessee, for it shall be taken most strongly against the lessor, and, as hath been said, an estate for a man's own life is higher than for the life of another. But if tenant in tail make such a lease without expressing for whose life, this shall be taken but for the life of the lessor; for when the construction of any act is left to the law, the law will never so construe it as to work a wrong"; and tenant in tail cannot lawfully make a lease beyond the term of his own life, unless he execute a disentailing assurance, under which he may dispose of the land for an estate in fee simple absolute or for any less estate (*h*).

Limitation for life without expressing for whose life.

By tenant in tail.

(*d*) *Lewis Bowles' Case*, 11 Co. 79 *b*; Tud. L. C. Conv. 86. See *Snow v. Boycott*, [1892] 3 Ch. 110; 61 L. J. C. 591.

(*e*) *Rosse's Case*, 5 Co. 13 *a*; *Dule's Case*, Cro. Eliz. 182; *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192; 41 L. J. C. 255. As to occupancy, see *post*, p. 146.

(*f*) *Wright v. Dowley*, 2 W. Bl. 1185.

See *ante*, p. 119.

(*g*) See *ante*, p. 28.

(*h*) Co. Lit. 42 *a*, 183 *a*; see *ante*, p. 27. This reasoning is inapplicable in the case of leases made in exercise of statutory powers contained in the Settled Estates Act, 1877, and the Settled Land Act, 1882, and amending statutes.

- By tenant for life. For the like reason, "if tenant for life make a lease generally, this shall be taken by construction of law an estate for his own life that made the lease; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion" (i).
- Lease for several lives. A lease to A. during the lives of B. and C. continues during the life of the survivor, without express limitation to that effect; —so a lease to A. and B. during their lives continues during the life of the survivor. And therefore an estate for *joint* lives must be expressly so limited (k).
- For joint lives.
- Devise without words of limitation, under the Wills Act. By the Wills Act, 1837, s. 28, which does not extend to any will made before 1st January, 1838, it is enacted "that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appear by the will" (l).
- In will not under the Wills Act. In wills made before 1st January, 1838, to which the above Act does not extend, a devise of land without words of limitation follows the rule of law for the construction of conveyances, and *prima facie* creates an estate for life only. But in wills various modes of expressing the intention are allowed to supply the want of technical words of limitation, and to extend the devise to an estate of inheritance, according to certain rules of construction, which have been already noticed in treating of devises in fee simple (m).
- Devise for life by implication. If a devise be made, after the death of A., to B. who is the heir at law of the testator, and the estate until the death of A. is not disposed of by residuary devise or otherwise, A. takes an estate for life by implication; such implication being necessary to effectuate the devise to the heir in the manner expressed, that is, not until the death of A. But a devise, after the death of A., to B., if B. be not the testator's heir, raises no such implication (n).
- Occupancy of estate *pur autre vie*. If a tenant *pur autre vie* died before the person or persons on whose life or lives the estate depended, and no provision was made in the limitation of it for the destination of the land in the event of the estate continuing beyond his life, it was

(i) Co. Lit. 183 a. Tenants for life have now statutory powers to lease under the Settled Estates Act, 1877, and the Settled Land Act, 1882, and the amending statutes.

(k) *Brudnel's Case*, 5 Co. 9 a.

(l) See *ante*, p. 126.

(m) See *ante*, p. 126.

(n) *Gardner v. Sheldon*, Vaughan, 259; *Ralph v. Carrick*, 11 Ch. D. 873.

deemed at the common law to be vacant, and he who first entered became entitled to hold the land, as tenant under the lease, for the residue of the term. Such tenant was called an *occupant*, because his title was by his first occupation (*o*).

An occupancy may be prevented by an express limitation covering the vacancy. As by limiting the estate to the tenant, and "to his heirs" during the life of the *cestui que vie*, in which case it devolves while it lasts, like an estate in fee simple (*p*). A trust estate *pur autre vie*, limited to the heir as special occupant, now devolves upon the personal representatives of the trustee, notwithstanding any testamentary disposition to the contrary (*q*). A devise to trustees and their heirs is sometimes impliedly restricted to a descendible freehold *pur autre vie*, by reason of the trust being restricted to the life (*r*).

Limitation to special occupant,—to the heirs.

It may also be limited, like an estate tail, "to the heirs of his body;" it is then heritable by the issue, and is called a *quasi* entail (*s*).—It may also be limited to the tenant and his "executors or administrators," and it then devolves upon the personal representative (*t*).—The heir or representative thus taking by the terms of the limitation is called a *special* occupant, as being the occupant specially designated.

To the heirs of the body

To executor or administrator.

The case of general occupancy, where there is no limitation to a special occupant, is now supplied by statute. By the Wills Act, 1837 (replacing earlier statutes having the same object), the general power of disposition by will thereby given is expressly extended "to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof" (sect. 3).—And it is enacted by sect. 6, "that in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and

(*o*) Co. Lit. 41 *b*. "There can be no occupant of anything lying in grant;" *Ib.*, see *ante*, p. 37; but there may be a special occupant of such things by designation in the grant or under the statute providing against occupancy, Co. Lit. 388 *a*; as of a rent charge, *Bearpark v. Hutchinson*, 7 Bing. 178.

(*p*) *Seymour's Case*, 10 Co. 95 *b*; *Doe v. Steele*, 4 Q. B. 663; *Northen v. Carnegie*, 4 Drew. 587.

(*q*) Conveyancing and Law of Property Act, 1881, s. 30.

(*r*) *Beaumont v. Salisbury (Marq.)*, 19 Beav. 198; *Lewis v. Rees*, 3 K. & J. 132; *Collier v. Walters*, L. R. 17 Eq. 252. See *ante*, p. 128.

(*s*) *Low v. Burron*, 3 P. Wms. 262; *Fearne*, Cont. Rem. 495.

(*t*) See *Atkinson v. Baker*, 4 T. R. 229; *Ripley v. Waterworth*, 7 Ves. 448.

distributed in the same manner as the personal estate of the testator or intestate" (u).

This enactment applies to equitable estates *pur autre vie*, notwithstanding the legal estate be vested in trustees and their heirs (x).—An estate for the lives of the lessee and others is an estate *pur autre vie* within the statute (y).—The estate passing to the executor or administrator by special occupancy or under the Act, being made assets applicable in the same manner as personal estate, is thereby rendered liable to legacy duty, but is not made personal estate for the purpose of following the person and domicile of the deceased tenant; it is immovable property as regards jurisdiction notwithstanding his domicile be foreign (z).

Occupancy of copyholds.

There could be no general occupant of a copyhold or customary tenancy; because the freehold title remaining in the lord precluded a vacancy, and the lord became *de facto* occupant (a).

Special occupant.

But a special occupant may be expressly designated in the grant or surrender, to the exclusion of the occupancy of the lord; as by extending the estate "to the heirs."—And by special custom, in the absence of limitation, the heir or devisee or the *cestui que vie* may be entitled as special occupant (b).

By statute.

The Wills Act, 1837, s. 6, is expressly extended to lands of customary and copyhold tenure, and under that statute, if there be no special occupant, the estate will go to the executor or administrator of the tenant to be applied and distributed as personal estate (c). The special occupant by custom or under the statute must be admitted and pay a fine (d).

Discovery of the deaths of persons on whose lives estates depend.

In order to prevent frauds by the concealment of the deaths of persons on whose lives estates depend, a statute 6 Anne, c. 18, provides that a person claiming a remainder, reversion, or expectancy, after the death of any person may obtain an order of the Court of Chancery for the production of such person, and upon failure to produce such person, may enter upon the land as if such person were dead (e).

(u) *Re Sheppard*, [1897] 2 Ch. 67; 66 L. J. C. 445; *Re Inman*, [1903] 1 Ch. 241; 72 L. J. C. 120.

(x) *Reynolds v. Wright*, 2 De G. F. & J. 590; *Re Inman*, [1903] 1 Ch. 241; 72 L. J. C. 120.

(y) *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192; 41 L. J. C. 255.

(z) *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192; 41 L. J. C. 255.

(a) *Zouch v. Forse*, 7 East, 186; *Doe v. Scott*, 4 B. & C. 706. See Hargrave's

note (2) to Co. Lit. 59 b.

(b) *Doe v. Martin*, 2 W. Bl. 1148; *Right v. Bawden*, 3 East, 260; *Doe v. Goddard*, 1 B. & C. 522; *Doe v. Scott*, *supra*.

(c) See *ante*, p. 147.

(d) Co. Cop. s. 56; Wills Act, 1837, s. 6.

(e) *Re Owen*, 10 Ch. D. 166; *Re Stevens*, 31 Ch. D. 320; *Re Pople*, 40 Ch. D. 589. See *Re St. John's Hosp.*, 18 L. T. 317.

Proof that a person has been absent and not heard of for seven years raises a presumption of his death, but no presumption as to the time of his death. The ordinary presumption of life continues in the absence of any evidence respecting it (*f*). Presumption of death.

# SECTION IV. ESTATES FOR YEARS.

Estate for years—"term"—"lease"—requisites of lease—parol lease.  
 Limitation of term, as to duration—certainty required—lease for successive periods—lease "from year to year"—notice to determine—implied tenancies from year to year.  
 Limitation of term, to A. and to his executors—to A. and to his heirs—to A. and to the heirs of his body.  
 Lease with covenant for renewal—covenant runs with the land—condition of observing covenants, etc., in the lease.  
 Chattel interests of uncertain duration.

An estate for years is an estate limited by a certain term or duration of time. An estate for a term of half a year, or for a quarter of a year, or for a smaller portion of a year, as being for a term certain in time, is classed in law with an estate for a term of years, although it cannot be so defined, and is subject, in general, to the like rules and incidents (*a*). Estate for years.

The word "term" may be used to signify not only the limits of time, but also the estate and interest that passes for that time; and it is a question of construction in which sense the word is to be understood (*b*). "Term."

The grant of an estate for years is commonly called a *lease* or *demise*, the words "grant," "demise," and "let," being commonly used, though any words expressing the intention to transfer the possession for a certain time are sufficient (*c*). "Lease."

The term "lease" is applied also to the grant of an estate for life. The term "grant" is a general term, though used also in a special sense as applying to estates and rights in land which *lie in grant* in contrast to those which *lie in livery*. The term "feoffment" was used generally to denote a transfer of the seisin or immediate freehold estate; but it was applied also in a special sense to a transfer for an estate in fee simple; and the term "gift" to an estate Meaning of lease, grant, etc.

(*f*) *Nepean v. Doe*, 2 M. & W. 894; 2 Smith, L. C. 558; *Wing v. Angrave*, 8 H. L. C. 183; *Re Phené's Trusts*, L. R. 5 Ch. 139; *Prudential Ass. v. Edmonds*, 2 App. Cas. 487; *Re Benjamin*, [1902] 1 Ch. 723; 71 L. J. C. 319. See *Re Spenceley*, [1892] P. 255; 61 L. J. P. 133.

(*a*) Lit. ss. 58, 67; Co. Lit. 54 *b*. See *Lloyd v. Rosbee*, 2 Camp. 453; *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(*b*) Co. Lit. 45 *b*; *Rector of Chedington's Case*, 1 Co. 153 *a*; *Wright v. Cartwright*, 1 Burr. 282, 284.

(*c*) Co. Lit. 45 *b*; Bacon's Abr. Lease, (K); Shepp. Touch. by Preston, 272.

in fee tail;—the corresponding terms applied to the parties being *feoffor* and *feoffee*,—*donor* and *donee*,—*lessor* and *lessee* (*d*).

*Interesse  
termini.*

With the exception of leases operating under the Statute of Uses (*e*), the right of a lessee for years before entry is called an *interesse termini*. It is a right, and not an estate, a circumstance which has not entirely lost its importance at the present day (*f*). An *interesse termini* is assignable (*g*), and if a smaller interest is created, the person taking by sub-demise upon entry is *tenant* and entitled to maintain *ejectment* (*h*). In the older books it is said that a lessee before entry could not accept a release, or surrender his right so that he might claim an interest, or extinguish his right (*i*). In the present day, however, where more consideration is had for "the substance, namely the passing of the estate according to the intent of the parties, than the shadow, namely the manner of passing it," the purported release or surrender would be treated as an immediate conveyance and operative to extinguish the rents and services as between the immediate parties (*k*). As between third parties, the old rule would be applied in its original strictness where to do otherwise would work injustice (*l*). If a lease be granted to commence at a future day, the entry of the lessee before that day does not convert his right into an estate, although his possession be continued until after the date fixed for the commencement of the term (*m*). The principle upon which this case rests is that the prior entry is a *disseisin*, which confers a freehold title (*n*), and consequently one superior to that of a lessee.

Formalities—  
writing.

Deed.

Parol lease.

All leases (excepting leases not exceeding three years from the making and at a rent of two-thirds at least of the value) are required by the Statute of Frauds (ss. 1, 2) to be in writing; and by the Real Property Act, 1845, s. 3, (with the same exception,) they must be by deed. A parol lease within the above exception, when perfected as an estate by the entry of the lessee, was valid at law as a lease, and conferred all the rights and remedies incident to such lease; but if the lessee refused to effectuate it

(*d*) Lit. s. 57; Shepp. Touch. 228. See *ante*, pp. 32, 37, 38.

(*e*) 27 Hen. VIII. c. 10, s. 1. See *ante*, p. 81.

(*f*) *Lewis v. Baker*, [1905] 1 Ch. 46; 74 L. J. C. 39.

(*g*) *Bruerton v. Ruinsford*, Cro. El. 15; *Wheeler v. Thoroughgood*, Cro. El. 127.

(*h*) *Doe v. Day*, 2 Q. B. 147; 12 L. J. Q. B. 86.

(*i*) Co. Lit. 46 *b*, 51 *b*, 270 *a*, 338 *a*.

(*k*) *Doe v. Davies*, 2 M. & W. 503,

*per* Parke, B., *ib.* at p. 516; 6 L. J. Ex. 176; *Cottee v. Richardson*, 7 Ex. 143; 21 L. J. Ex. 52.

(*l*) *Doe v. Walker*, 5 B. & C. 111; *Lewis v. Baker*, [1905] 1 Ch. 46; 74 L. J. C. 39.

(*m*) *Hennings v. Brabason*, 1 Lev. 45. See *Neale v. Mackenzie*, 1 M. & W. 747; 6 L. J. Ex. 263.

(*n*) *Rosenberg v. Cook*, 8 Q. B. D. 162; *Perry v. Clissold*, [1907] A. C. 73; 76 L. J. P. C. 19.

by entry, no action could be brought upon it (o). In a court of equity, an instrument which was void at law by reason of the omission to comply with the statutory requirement of a deed might operate as an agreement to grant a lease (p); and the formality of writing might be dispensed with, and a verbal agreement proved, where the contract had been part performed (q). And now by the provisions of the Judicature Act, 1873, s. 25, a contract of which the court would grant specific performance is to be regarded as if completed (r), so that the provisions of the before-mentioned statutes are in part abrogated, but it is to be observed that the necessity for an actual entry to complete the title is not dispensed with.

The term must be limited, as to duration, by a certain time either in express terms or by reference,—“For regularly in every lease for years the term must have a certain beginning and a certain end—yet if by reference to a certainty it may be made certain it sufficeth, *quia id certum est quod certum reddi potest*. For example, if A. leaseth his land to B. for so many years as B. hath in the manor of Dale, and B. hath then a term in the manor of Dale for ten years, this is a good lease by A. to B. of the land of A. for ten years.”—“So, if a lease be made to another during the minority of J. G., and he is of the age of ten years, now this is a good lease for eleven years, if J. G. shall as long live” (s).

Limitation of term, as to duration.

“It is here to be understood that the years must be certain, when the lease is to take effect in interest or possession. For before it takes effect in interest or possession, it may depend upon an uncertainty.”—“For example, if A. seised of land in fee grant to B. that when B. pays to A. twenty shillings, from thenceforth he shall have the land for twenty-one years, and after B. pays the twenty shillings, this is a good lease for twenty-one years from thenceforth.”—So, “if a man maketh a lease to J. S. for so many years as J. N. shall name, this at the beginning is uncertain; but when J. N. hath named the years, then it is a good lease for so many years” (t).

Certainty required.

(o) *Edge v. Strafford*, 1 C. & J. 391. See *Wright v. Stavert*, 2 Ell. & Ell. 721. And see Leake, Contracts, pp. 155 et seq.

(p) *Parker v. Taswell*, 2 De G. & J. 559; *Zimble v. Abrahams*, [1903] 1 K. B. 577; 72 L. J. K. B. 103.

(q) *Nunn v. Fabian*, L. R. 1 Ch. 35; *Miller and Aldworth, Lim. v. Sharp*, [1899] 1 Ch. 622; 68 L. J. C. 322.

(r) *Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J. C. 2; *Lowther v. Heaver*, 41

Ch. D. 248; 58 L. J. C. 482. See *Swain v. Ayres*, 21 Q. B. D. 289; 57 L. J. Q. B. 428.

(s) *Bishop of Bath's Case*, 6 Co. 34 b; *Kirsley v. Duck*, 2 Vern. 684; *Sutherland v. Briggs*, 1 Ha. 26; *Dolling v. Evans*, 36 L. J. C. 474; *Marshall v. Berridge*, 19 Ch. D. 233; 51 L. J. C. 329.

(t) *Bishop of Bath's Case*, 6 Co. 34 b; and it seems that if the number of years be named after the commencement of

A lease for so many years as a person may live is a freehold estate by reason of the uncertainty of the term (*u*). But if "a man maketh a lease for twenty-one years if J. S. live so long, this is a good lease for years, and yet is certain in uncertainty"; it has a certain limit notwithstanding the uncertainty of reaching it (*v*).

Lease for successive terms,—7, 14, or 21 years.

A lease may be limited to continue for successive periods at the option of one or other of the parties:—as for a term of 7, 14, or 21 years, which continues for those successive periods, unless the option to determine it at the end of one of the periods is duly exercised; and such option rests presumptively with the lessee, if no intention to the contrary be expressed (*y*).

Implied tenancies from year to year—from a general letting at a fixed rent.

Where the term limited is uncertain, but imports a general occupation, as a lease "from year to year," it is a term for one year certain, continuing for successive years, unless due notice have been given to determine it at the end of the first or any subsequent year (*z*). If there be a general letting at a yearly rent, it is none the less to be treated as a tenancy from year to year, although the rent be payable by instalments by the quarter, or some other aliquot part of the year (*a*). A lease "for one year, and so on from year to year," is a term for two years certain, continuing for successive years, unless due notice have been given to determine it (*b*).

Notice required to determine tenancy.

The notice required by law to determine a tenancy from year to year, in the absence of agreement to the contrary, must be given one year before the expiration of the current year of the tenancy in the case of an agricultural holding, unless the tenant be adjudged bankrupt, or file a petition for a composition or arrangement with his creditors (*c*). In all other cases a notice given half a year before and terminating at the same period is sufficient (*d*). A tenancy from year to year is determinable by

the lease (in the life of the lessor), the lease will be made good *ex post facto*. 1b.

(*u*) *Brewer v. Hill*, 2 Anstr. 413; *Zimble v. Abrahams*, [1903] 1 K. B. 577; Co. Lit. 42 a, 45 b.

(*v*) Co. Lit. 45 b. See *Wright v. Carterwright*, 1 Burr. 282. This is a term of years with a conditional limitation, as to which, see *post*, p. 166.

(*y*) *Doe v. Diron*, 9 East, 15; *Dann v. Spurrier*, 3 B. & P. 399; 7 Ves. 231; *Powell v. Smith*, L. R. 14 Eq. 85; 41 L. J. C. 734.

(*z*) *Right v. Darby*, 1 T. R. 159; *Diron v. Bradford, etc., Supply Soc.*, [1904] 1 K. B. 444; *Lewis v. Baker*, [1906] 2 K. B. 599. See Kenyon, C. J., *Doe v. Watts*, 7 T. R. 83, 85.

(*a*) *Mansfield, C. J., Richardson v. Langridge*, 4 Taunt. 128, 131; *Parke, B., Doe v. Wood*, 14 M. & W. 682, 687. See *Hastings Union v. St. James, Clerkenwell*, L. R. 1 Q. B. 38; *Doe v. Grafton*, 18 Q. B. 496; 21 L. J. Q. B. 276.

(*b*) *Denn v. Cartwright*, 4 East, 29; *Johnstone v. Huddestone*, 4 B. & C. 922; *Doe v. Green*, 9 A. & E. 658.

(*c*) *Agricultural Holdings Act*, 1883, ss. 33, 54; *Barlow v. Teal*, 15 Q. B. D. 501; 54 L. J. Q. B. 564.

(*d*) *Right v. Darby*, 1 T. R. 159; *Doe v. Dubell*, 1 Q. B. 806; *Morgan v. Davies*, 3 C. P. D. 260; *Sidebotham v. Holland*, [1895] 1 Q. B. 378; 64 L. J. Q. B. 200.



either party giving the proper notice (*e*). Where the term is determined by force of an express limitation, the lease itself supplies sufficient notice; both parties are equally apprised of the determination of the term, and no further notice is required (*f*).

Payment of rent in respect of a tenancy is *prima facie* evidence of a tenancy from year to year, with the usual incidents of such a tenancy (*g*).

A tenancy from year to year is, in general, implied from the payment and acceptance of a yearly rent under an agreement for a lease not amounting to an actual demise (*h*); but mere occupation, without payment of the rent, will not raise the same implication (*i*). A tenancy from year to year would also be implied from the payment of rent by the tenant in respect of a continued occupation after the expiration of a lease (*k*); but a continued occupation or holding over alone is not sufficient to imply a tenancy (*l*).

The tenancy thus implied will include all the terms of the agreement or previous lease which are applicable to such a tenancy, as conditions of re-entry, stipulations as to notice, etc. (*m*):—thus, it will expire without notice at the end of the term limited in the agreement (*n*); and a stipulation that the tenant shall paint in the last year of the term limited will apply, if the tenancy so long continues (*o*). A lease or agreement which did not comply with the provisions of the Statute of Frauds or the Real Property Act, 1845, might be upheld in a court of law as a tenancy from year to year after entry and payment of rent (*p*); but by force of the Judicature Act, 1873, a lease or agreement which would not have been enforceable at law must in all jurisdictions be upheld as an actual demise according to the

Payment of rent.

Under an agreement for a lease.

After expiration of a lease.

Terms of implied tenancy from year to year.

(*e*) *Doe v. Browne*, 8 East, 165; *King's Leaseholds*, L. R. 16 Eq. 521.

(*f*) *Right v. Darby*, 1 T. R. 159.

(*g*) *Doe v. Watts*, 7 T. R. 83; *Doe v. Crago*, 6 C. B. 90; *Smith v. Willlake*, 3 C. P. D. 10; *Serjeant v. Nash*, [1903] 2 K. B. 304; *Batten-Pooll v. Kennedy*, [1907] 1 Ch. 256; 76 L. J. C. 102.

(*h*) *Cox v. Bent*, 5 Bing. 185; *Chapman v. Towner*, 6 M. & W. 100; *Braythwaite v. Hitchcock*, 10 M. & W. 494. See *Warr & Co. v. London C. C.*, [1904] 1 K. B. 713; 73 L. J. K. B. 362.

(*i*) *Waring v. King*, 8 M. & W. 571; *Anderson v. Midland Ry.*, 3 E. & E. 614; 30 L. J. Q. B. 94; see "Tenancy at Will," *post*, p. 156.

(*k*) *Doe v. Weller*, 7 T. R. 478; *Bishop v. Howard*, 2 B. & C. 100; *Doe*

*v. Dobell*, 1 Q. B. 806; *Dougal v. McCarthy*, [1893] 1 Q. B. 736; 62 L. J. Q. B. 462.

(*l*) *Waring v. King*, 8 M. & W. 571; *Elliott v. Johnson*, L. R. 2 Q. B. 120; 36 L. J. Q. B. 41. As to the remedies of the landlord in such case, see 4 Geo. II. c. 28, s. 1.

(*m*) *Doe v. Powell*, 5 B. & C. 312; *Doe v. Amey*, 12 A. & E. 476; *Doe v. Bell*, 5 T. R. 471.

(*n*) *Tress v. Sacage*, 4 E. & B. 36; 23 L. J. Q. B. 339.

(*o*) *Martin v. Smith*, L. R. 9 Ex. 50; 43 L. J. Ex. 42.

(*p*) *Doe v. Bell*, 5 T. R. 471; 2 Smith, L. C. 119; *Clayton v. Blakey*, 8 T. R. 3; 2 Smith, L. C. 127. See *ante*, p. 150.

agreement of the parties, if prior to that statute a court of equity would have compelled specific performance of the agreement (*q*).

Express terms  
exclude  
implication.

An express stipulation to a different effect excludes the implication of a tenancy from year to year, as where it is expressly agreed that the tenancy shall be determinable at will (*r*). The words, "so long as both parties shall please," are not inconsistent with a tenancy from year to year (*s*).

Limitation of  
term,—to A.  
and to his  
executors.

A lease for years is sometimes limited in the form "to A. and to his executors and administrators," in analogy with the limitation of an estate of inheritance "to A. and to his heirs." But the additional words of limitation in this case are quite superfluous; they merely denote the rule of law respecting the devolution of the term, as personal estate, which would apply without the addition of those words (*t*). If a lease be made to a person for life, with remainder to his executors for a term of years, it is apparently doubtful whether the term of years rests in the lessee himself as well as if it had been limited to him and to his executors, or whether the executors take the term after his death as purchasers (*u*).

To A. and to  
his heirs.

If a lease be made to a man and "to his heirs" for a term of years, it will pass as personal estate, to the executor of the lessee and not to the heir; the limitation to the heirs, being wholly inapplicable to personal estate, is rejected (*x*).

To A. and to  
the heirs of  
his body.

If a lease be made to a man and "to the heirs of his body" for a term of years (or in any other terms which expressly or impliedly would raise an estate tail in the inheritance), the whole term vests absolutely in the immediate donee in tail (*y*).—And it is the same with bequests by will: "where personal estate (including terms of years of whatever duration) is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and consequently devolves at his death to his personal representative and not to his heir in tail" (*z*).

(*q*) *Walsh v. Lonsdale*, 21 Ch. D. 9; 52 L. J. C. 2; *Lowther v. Heaver*, 41 Ch. D. 248; 58 L. J. C. 482; *Zimble v. Abrahams*, [1903] 1 K. B. 577; 72 L. J. K. B. 193; *Warr & Co. v. London C. C.*, [1904] 1 K. B. 713; 73 L. J. K. B. 362.

(*r*) *Richardson v. Langridge*, 4 Taunt. 128; *Morton v. Woods*, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81.

(*s*) *Doe v. Smaridge*, 7 Q. B. 957. See *Doe v. Cox*, 11 Q. B. 122, *per* Coleridge, J.

(*t*) *Anderson v. Martindale*, 1 East,

497; *Shepp. Touch.* by Preston, 76.

(*u*) Co. Lit. 54 *b*, and see cases there cited; *Webb v. Sadler*, L. R. 8 Ch. 419; 42 L. J. C. 498.

(*x*) Co. Lit. 388 *a*; *Shepp. Touch.* by Preston, 76.

(*y*) *Fearne*, Cont. Rem. 461; and see *Lovies's Case*, 10 Co. 87 *b*, there commented upon.

(*z*) *Ware v. Polhill*, 11 Ves. 257; *Warter v. Warter*, 2 Brod. & B. 349; 1 B. & C. 721; *Christie v. Gosling*, L. R. 1 H. L. 279.

A term of years may be attended with the right of renewal by virtue of a covenant inserted in the lease to that effect.—A covenant to renew a lease, with all the covenants and articles contained in it, does not import that the renewed lease shall contain a covenant for renewal; but the covenant may in express terms give the right of perpetual renewal of successive leases (*a*).—A covenant for renewal runs with the land in favour of assignees of the lease, and against grantees of the reversion (*b*).

Lease with covenant for renewal.

Covenant for renewal runs with the land.

The covenant for renewal may be expressed to be conditional upon the observance by the lessee of all his covenants in the lease, and then by breach of the covenants his right of renewal will be forfeited. Equity will not relieve the lessee in such case; nor will equity relieve the lessee in case of neglect to renew within the appointed time, unless caused by fraud of the lessor, or unavoidable accident, or ignorance (*c*).

Renewal conditional upon observance of covenant.

Some estates, the duration of which is measured by the raising of money or by the satisfaction of debts out of the profits of the land, although uncertain in duration, yet being of the nature of chattel interests, in that respect, may be classed with estates for years.—As if a man devised land to his executors or trustees for payment of his debts, and until his debts were paid; or to pay legacies, or raise a sum of money for portions or the like; in this case the executors and trustees took a chattel interest,—for if they should have it for their lives, then by their death their estate would cease, and the debts and legacies might be unpaid, and the portions unsatisfied; but by treating it as a chattel interest it devolved upon the executors or trustees for the payment of the debts or other sums (*d*).

Chattel interests of uncertain duration.

Devise for payment of debts.

But now by the Wills Act, 1 Vict. c. 26, s. 30, applying to wills made on or after 1st January, 1838, it is enacted “that where any real estate shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of

Devise to trustee or executor under the Wills Act.

(*a*) *Iggulden v. May*, 7 East, 237; 2 B. & P. N. R. 449; 9 Ves. 325; *Swinburne v. Milburn*, 9 App. Cas. 844.

(*b*) *Anon.*, Moo. 159, pl. 300; *Shelburne v. Biddulph*, 6 Bro. P. C. 356; *Simpson v. Clayton*, 4 Bing. N. C. 758. As to covenants running with the land, see Leake, Contracts, 858. As to the renewal of a lease by a trustee, see *ante*, p. 116.

(*c*) *Harries v. Bryant*, 4 Russ. 89;

*Job v. Banister*, 2 K. & J. 374; 26 L. J. C. 125; *Bastin v. Bidwell*, 18 Ch. D. 238; *Nicholson v. Smith*, 22 Ch. D. 640; 52 L. J. C. 191.

(*d*) *Corbet's Case*, 4 Co. 83 b; *Doe v. Simpson*, 5 East, 162; *Ackland v. Lutley*, 9 A. & E. 879; 8 L. J. Q. B. 164; *Ackland v. Pring*, 2 Man. & G. 937; 10 L. J. C. P. 297. See *Carter v. Barnardiston*, 1 P. Wms. 505.

years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication" (e).

Right of entry for arrears of rent.

A grant of a rent out of land with a clause entitling the grantee, if the rent be in arrear, to enter or take the profits until the arrears be satisfied, gives, upon entry, a chattel interest, though of uncertain duration (f).

Tenant by *elegit*.

Tenant by *elegit* holds the land until the debt is satisfied, and has a chattel interest and no freehold (g).

Tenant by statute merchant and statute staple.

So, in former times, the estates of tenant by *statute merchant* and tenant by *statute staple* were considered merely as chattel interests, being a security provided for personal debts, to which the executor is entitled; the law so directed their devolution, that the security should be vested in him to whom the debts, if recovered, would belong (h).

## SECTION V. TENANCY AT WILL.

Tenancy at will—of both lessor and lessee—of lessee only—creates no tenure or reversion.

Creation of tenancy at will—with reservation of rent—possession of *cestui que trust*—possession under agreement to purchase—customary tenancy at will.

Determination of tenancy at will—by the lessor—by the lessee—by death of lessor or lessee—under the statute of limitations.

Tenancy at sufferance—distinction between tenancy at sufferance and at will.

Statutory remedies against tenants holding over.

Tenancy at will.

Of both lessor and lessee.

A tenancy at will is where a person is in possession of land let to him to hold at the will of both lessor and lessee, or of the lessor only, for the law imports from a demise expressed to be at the will of the lessor that it may be terminated also at the will of the lessee (a).

Of lessee only.

A lease or grant purporting to limit the estate to hold at the will of the lessee *only*, that is, for so long a time as the lessee pleases to continue tenant, is a freehold or estate for life determinable at the will of the lessee; but the formality of livery of

(e) See *ante*, p. 128.

(f) *Jemott v. Cowley*, 1 Wms. Saund. 132.

(g) Co. Lit. 42 a, 43 b; *Corbet's Case*, 4 Co. 81 b. See *Underhill v. Devereux*, 2 Wms. Saund. 197, and note at p. 202; *Johns v. Pink*, [1900] 1 Ch. 296; 69 L. J. C. 98.

(h) Butler's note to Co. Lit. 208 b; 2 Blackst. Com. 162; *Corbet's Case*, 81 b;

note to *Underhill v. Devereux*, 2 Wms. Saund. at p. 217. Abolished by 26 & 27 Vict. c. 125.

(a) *Richardson v. Langridge*, 4 Taunt. 128; *Ball v. Chulmore*, 2 Cr. M. & R. 120; *Doe v. Davies*, 7 Ex. 92. See *Davis v. Waddington*, 7 Man. & G. 37; *Fernie v. Scott*, L. R. 7 C. P. 202; 41 L. J. C. P. 20.

seisin or a deed, which would have been formerly necessary, may now be dispensed with if a court of equity would have compelled specific performance of the agreement (*b*).

A tenancy at will creates no tenure; "for tenant at will shall not do fealty, when he hath no certain estate, but may be put out at the pleasure of the lessor, or he himself may determine it at his pleasure."—"But otherwise it is of a copyholder or tenant at will according to the custom of the manor, for that he is bound to do fealty; and the reason is because there is a tenure" (*c*).

Tenancy at will creates no tenure.

Accordingly, the estate of the lessor, not being reversionary, lay in livery only, and not in grant, so long as that distinction prevailed (*d*). Hence, also, rent reserved upon a tenancy at will, though distrainable of common right, is not rent service (*e*).

No reversion.

Or rent service.

A tenancy at will may be created by taking possession of or occupying land with the permission of the landlord, which may be evidenced by acts of acquiescence on his part (*f*).

Creation of tenancy at will.

A tenancy at will may be made by express agreement to that effect, notwithstanding a reservation of rent payable yearly, or at other fixed periods; the express limitation rebuts the implication of a tenancy from year to year which might arise from the reservation or payment of the periodical rent (*g*).

Tenancy at will with rent reserved.

According to the above principles a *cestui que trust* in possession of land with the consent of the trustee is regarded in law as in the position of tenant at will (*h*). But as an equitable title is now a complete answer to an action for the recovery of land by the legal owner of the legal estate, (*i*) the point is devoid of practical importance. A *cestui que use* was also deemed a tenant at will before the Statute of Uses (*k*).

Possession of *cestui que trust*.

Upon the same principles a purchaser of land let into possession by the vendor before completion of the conveyance, is regarded in law as in the position of a tenant at will to the vendor (*l*). In

Possession under agreement to purchase.

(*b*) *Doe v. Browne*, 8 East, 165; *Zimble v. Abrahams*, [1903] 1 K. B. 577; 72 L. J. K. B. 103. See *Beeson v. Burton*, 12 C. B. 647; 22 L. J. C. P. 33. (*c*) Co. Lit. 63 *a*, 93 *b*. See *per Best*, C. J., *Garland v. Jekyll*, 2 Bing. 273, 293.

(*d*) Co. Lit. 270 *b*; 1 Roll. Abr. 292 *a*, pl. 9.

(*e*) Co. Lit. 57 *b*.

(*f*) *Doe v. Rock*, 4 Man. & G. 30; 11 L. J. C. P. 194; *Doe v. Turner*, 7 M. & W. 226; *Turner v. Doe*, 9 M. & W. 643; 11 L. J. Ex. 453; *Doe v. Carter*, 9 Q. B. 863; 18 L. J. Q. B. 305; *Doe v. Coombes*, 9 C. B. 714; 19 L. J. C. P. 306. See

*Smith v. Widdlake*, 3 C. P. D. 10; 47 L. J. C. P. 282.

(*g*) *Richardson v. Langridge*, 4 Taunt. 128; *Doe v. Cor*, 11 Q. B. 122; *Doe v. Davies*, 7 Ex. 89; *Anderson v. Midland Ry.*, 3 Ell. & Ell. 614; 30 L. J. Q. B. 94.

(*h*) *Freeman v. Barnes*, 1 Vent. 80; *Garrard v. Tuck*, 8 C. B. 231; 18 L. J. C. P. 338.

(*i*) *Zimble v. Abrahams*, [1903] 1 K. B. 577; 72 L. J. K. B. 103.

(*k*) Lit. ss. 462, 463.

(*l*) *Right v. Beard*, 13 East, 210; *Bull v. Cullimore*, 2 Cr. M. & R. 120; *Doe v. Rock*, 4 Man. & G. 30. See *Winterbottom v. Ingham*, 7 Q. B. 611.

equity he is considered as owner according to the terms of the contract (*m*).

Customary  
tenancy at  
will.

Under the law of freehold tenure, the possession of a customary tenant is regarded as a tenancy at will to the lord, though the will of the lord as to the duration of the tenancy is regulated by the custom; and the rights of possession and enjoyment incident to the tenancy, in the absence of special custom, are the possessory rights of tenants at will at common law (*n*).

Determina-  
tion of  
tenancy at  
will by lessor.

The lessor may determine the tenancy at will expressly, as by a demand of possession (*o*),—or impliedly, by doing any acts of ownership inconsistent with the continuance of the tenancy; as entering and cutting down trees, or cutting and carrying away stone without the consent of the lessee, or executing a conveyance or a fresh lease to a third party (*p*).—The lessor may maintain an action of ejectment without a formal notice to quit (*q*).

Determina-  
tion by lessee.

The lessee may determine the tenancy at will by express notice and quitting possession; but a mere notice without quitting possession would not be sufficient as against the lessor (*r*). Transfer of the possession to another with notice to the lessor is a determination of the tenancy, and operates as a disseisin at the election of the lessor (*s*). “A tenant at will cannot as against the landlord to whom he is tenant constitute another person tenant at will; but he can make a tenant at will as against himself” (*t*).—Any acts of ownership by the lessee inconsistent with the mere tenancy at will, as cutting down timber trees or voluntarily pulling down houses, may be treated, as against him, as a determination of the tenancy (*u*).

Determina-  
tion by death  
of lessor or  
lessee

A tenancy at will is determined by the death of the lessor or of the lessee (*x*). And though the lease be made to the lessee to

(*m*) *Rose v. Watson*, 10 H. L. C. 672; *Whitbread & Co. v. Watt*, [1902] 1 Ch. 835; 71 L. J. C. 424. See *London and County Bank v. Lewis*, 21 Ch. D. 490.

(*n*) *Keyse v. Powell*, 2 E. & B. 132; 22 L. J. Q. B. 305; *Bowser v. MacLean*, 2 De G. F. & J. 415; 30 L. J. C. 273. See *ante*, pp. 53, 66, 157.

(*o*) *Locke v. Matthews*, 13 C. B. N. S. 753; 32 L. J. C. P. 98; *Doe v. Price*, 9 Bing. 356; *Roe v. Street*, 2 A. & E. 329; *Pullen v. Brewer*, 7 C. B. N. S. 371.

(*p*) *Bull v. Cullimore*, 2 Cr. M. & R. 120; *Turner v. Doe*, 9 M. & W. 643; 11 L. J. Ex. 453; *Wallis v. Delmar*, 29 L. J. Ex. 276.

(*q*) *Denn v. Rawlins*, 10 East, 261;

*Right v. Beard*, 13 East, 210; *Smith v. Widlake*, 3 C. P. D. 10; 47 L. J. C. P. 282.

(*r*) Co. Lit. 55 *a*; Hargrave's note (15) to Co. Lit. 55 *b*.

(*s*) *Blunden v. Baugh*, Cro. Car. 302; *Pinhorn v. Sonster*, 8 Ex. 763; 22 L. J. Ex. 266.

(*t*) *Patteson, J., Doe v. Carter*, 9 Q. B. 863, 865.

(*u*) *Shrewsbury's (Countess) Case*, 5 Co. 13 *b*.

(*x*) *Doe v. Rock*, 4 Man. & G. 30; Co. Lit. 62 *b*. But not by the death of one of joint lessors or lessees. *Henstead's Case*, 5 Co. 10 *a*.

hold to him and to his heirs at the will of the lessor, the words (to the heirs of the lessee) are void; for by the death of the lessee the lease is absolutely determined, and if his heir enter he is a trespasser (*y*). But it is otherwise with a tenant at will according to the custom of a manor, who may have an estate of inheritance or any less estate by the custom (*z*).

Upon the determination of a tenancy at will by the lessor or by his death, the lessee retains the right to the emblements or annual crops which he has sown during the tenancy, with the right to enter upon the land to cut and carry them.—So, upon the death of the lessee, his executor has the same right; but if the lessee determine the tenancy by his own act, he has no such right (*a*). And upon the determination of the tenancy by the lessor, the lessee has an implied licence to enter for a reasonable time to remove his goods (*b*).

Right of tenant at will or his executor to take crops.

And to remove goods.

By the joint effect of sect. 7 of the Real Property Limitation Act, 1833, and sect. 1 of the Real Property Limitation Act, 1874, the title of a tenant at will to the land becomes absolute as against his immediate lessor and those claiming under him after the expiration of twelve years from the determination of the tenancy, or, if not formally determined, at the expiration of thirteen years next after the commencement of the tenancy; with a proviso that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of the clause, to his mortgagee or trustee (*c*). If a new tenancy at will be created by agreement of the parties, express or implied, before the title of the lessee has become absolute, then a fresh period of twelve years from the determination of the new tenancy, or thirteen years from its commencement, must elapse before the statutory title of the lessee is complete (*d*). The proviso has been extended to constructive trusts where the justice of the case so required (*e*).

Determination of tenancy at will under the statute of limitations.

“A tenant at sufferance is he that at first came in by lawful demise, and after his estate ended continueth in possession and wrongfully holdeth over” (*f*). A tenant at sufferance differs from

Tenancy at sufferance.

(*y*) Co. Lit. 62 *b*.  
 (*z*) Co. Lit. 63 *a*. See *ante*, pp. 71, 79.  
 (*a*) Co. Lit. 55 *a*, *b*, 56 *a*.  
 (*b*) Co. Lit. 56 *a*. See *Doe v. M'Kay*, 10 B. & C. 721; *Cornish v. Stubbs*, L. R. 5 C. P. 334; 29 L. J. C. P. 202.  
 (*c*) *Bobbett v. S. E. Ry.*, 9 Q. B. D. 424; *Day v. Day*, L. R. 3 P. C. 751; 40 L. J. P. C. 35. See *Brighton (Corp.) v. Brighton Guardians*, 5 C. P. D. 368; *Midland Ry. v. Wright*, [1901] 1 Ch. 738; 70 L. J. C. 411.

(*d*) *Day v. Day*, L. R. 3 P. C. 751; 40 L. J. P. C. 35.  
 (*e*) *Warren v. Murray*, [1894] 2 Q. B. 648; 64 L. J. Q. B. 42.  
 (*f*) Co. Lit. 57 *b*. A mortgagor who continues in possession after conveyance of the legal estate to the mortgagee, is at law in the position of tenant at sufferance, unless the mortgage deed provide to the contrary. See *post*, Sect. VII. “Mortgage,” pp. 211, 212.

a disseisor in that his original entry is lawful, and from a tenant at will in that his holding over, after the determination of his original term, is wrongful (*g*). The principle that it is competent to a person to waive a tort is applicable to this branch of the law, and it is open to the landlord by the acceptance of rent as rent, or other acts, to convert the tortious holding into a lawful one (*h*). The landlord, however, is permitted to explain his acts, and the acceptance of rent is not conclusive to bind him (*i*). The position of the tenant is different. To allow him to plead that he was merely tenant at sufferance would be to allow him to plead his own wrong or default, which the law never allows, and it would seem that unless the landlord has elected to treat the holding over as a trespass, he is entitled at any time to affirm a new tenancy (*k*).

If the tort is waived, the tenant at sufferance becomes tenant from year to year, the term being deemed to commence upon the day corresponding with that upon which the former term commenced (*l*). *Prima facie* the other incidents of the original demise remain in force so far as they are applicable to a tenancy from year to year, but this is not necessarily the case, and the actual terms of the new tenancy may be given in evidence (*m*). If either party could maintain an action for specific performance for a new term, and not merely a tenancy from year to year, the agreement in this respect would now be given effect to in all courts (*n*). The landlord may rightfully enter or maintain an action of ejectment against a tenant at sufferance without any demand of possession, but he must enter before he can maintain an action of trespass (*o*). After the lapse of twelve years without payment of rent a claim to the land by the landlord or by those claiming under him would be barred as against a tenant at sufferance (*p*).

(*g*) Co. Lit. 57 *b*, 270 *b*; Butler's note to Co. Lit. 270 *b*.

(*h*) *Bishop v. Howard*, 2 B. & C. 100; *Dougal v. McCarthy*, [1893] 1 Q. B. 736; 62 L. J. Q. B. 462.

(*i*) *Ibbs v. Richardson*, 9 A. & E. 849; 8 L. J. Q. B. 126; *Doe v. Crago*, 6 C. B. 90; 17 L. J. C. P. 263.

(*k*) *Per* Lord Esher, M. R., *Dougal v. McCarthy*, [1893] 1 Q. B. 736, 741; 62 L. J. Q. B. 462.

(*l*) *Kelly v. Patterson*, L. R. 9 C. P. 681; 43 L. J. C. P. 320; *Dougal v. McCarthy*, [1893] 1 Q. B. 736; 62 L. J. Q. B. 462.

(*m*) *Hyatt v. Griffiths*, 17 Q. B. 505; *Oakley v. Mouck*, L. R. 1 Ex. 159; 35

L. J. Ex. 87; *Cornish v. Stubbs*, L. R. 5 C. P. 334; 39 L. J. C. P. 202; *Martin v. Smith*, L. R. 9 Ex. 50; 43 L. J. Ex. 42.

(*n*) *Zimble v. Abrahams*, [1903] 1 K. B. 577; 72 L. J. K. B. 103. See *Keith v. Gancia & Co.*, [1904] 1 Ch. 774; 73 L. J. C. 411.

(*o*) Co. Lit. 57 *b*; *Thunder v. Belcher*, 3 East, 449; *Doe v. Quigley*, 2 Camp. 505; *Doe v. Day*, 2 Q. B. 147; 12 L. J. Q. B. 86.

(*p*) Real Property Limitation Act, 1833, s. 8; Real Property Limitation Act, 1874, s. 1; *Archbold v. Scully*, 9 H. L. C. 360; *Re Jolly*, [1900] 2 Ch. 616; 69 L. J. C. 661.



Remedies have been given by statute against tenants holding over, besides the ordinary remedies for the recovery of possession. By the statute 4 Geo. II. c. 28, s. 1, any tenant for term of life lives or years, or other person coming into possession under such tenant, who shall wilfully hold over after the determination of such term, and after demand made and notice in writing given for delivering the possession, is made liable to pay to the person kept out of possession double the yearly value of the lands for the time they are detained. And by the 11 Geo. II. c. 19, s. 18, any tenant who shall give notice to quit, and shall not accordingly deliver up possession at the time in such notice, is made liable to pay to the landlord double the rent during the time he shall continue in possession (*q*).

Remedies by statute against holding over;—double value.

Double rent.

## SECTION VI. CONDITIONAL LIMITATIONS AND CONDITIONS.

§ 1. Conditional limitations.

§ 2. Conditions.

§ 3. Construction and application of conditions.

Estates in fee simple, fee tail, for life and for years are distinguished, as above explained, by the limits prescribed for their duration, and they regularly determine upon attaining their respective limits, namely, failure of heirs or of issue, death of the person by whose life the estate is limited or lapse of time. They may, however, be subjected to conditions by force of which, without losing their distinctive character, they may be determinable without attaining their regular limits of duration. Estates thus made conditionally determinable form the subject of this section.

Estates determinable by conditions.

Estates may also be limited to *arise* upon conditions; and according to their effect as giving rise to or determining the estate, conditions in general are distinguished as conditions *precedent* and conditions *subsequent* (*a*). But conditions precedent do not affect the limitation of the estate in respect of quantity or duration; they relate only to the time of commencement or vesting of the estate, and therefore belong to the second chapter of this part, which treats of the limitation of future estates.

Estates arising upon conditions.

Conditions precedent.

(*q*) *Cobb v. Stokes*, 8 East, 358; (*a*) Co. Lit. 201 *a*. See *Re Green-Soulsby v. Nering*, 9 East, 310; *Anderson v. Midland Ry.*, 3 Ell. & Ell. 614; 281, 30 L. J. Q. B. 94.

Conditions precedent giving rise to future estates occur in contingent remainders at common law, in limitations by way of springing and shifting uses, and in executory devises (*b*).

It may be observed that conditions precedent giving rise to future estates may operate indirectly as conditions subsequent relatively to the preceding estate by defeating it; upon the happening of the conditional event they displace the preceding estate, and are substituted for it. But they are not on that account brought within the scope of the present section, because they are altogether extraneous to the limitation of the preceding estate (*c*).

Conditions subsequent.

Those conditions only which enter into the limitation of the estate as to quantity or duration, and render it determinable, or *conditions subsequent*, have here to be considered. With respect to these it may be further incidentally observed that they may be annexed to future estates, vested or contingent; so that they may operate upon estates in remainder and determine them before they become vested in possession (*d*); and they may operate upon contingent estates before they become vested in interest (*e*).

The conditions subsequent, which are the subject of this section, appear in the two forms of *conditional limitations* and *conditions of re-entry*, or *conditions* strictly so called at common law, which forms of condition, as they differ essentially in their respective modes of operation, require to be treated separately.

Conditional limitations.

Conditions of re-entry.

A *conditional limitation* operates to determine the estate by the intrinsic force of the limitation; in the event prescribed by the terms of the condition the estate ceases. A *condition* operates by reserving a right of re-entry (or in some cases it may be some other mode of defeating the estate) to the grantor and his heirs; in the event prescribed, the estate becomes defeasible by entry, but until entry the estate continues (*f*).

Accordingly this section is divided into sub-sections, treating (§ 1) of conditional limitations and (§ 2) of conditions of re-entry, or conditions strictly so called; and there will remain to be noticed some rules and doctrines of law relating to the

(*b*) See *ante*, pp. 33, 50, 88.

(*c*) See *Doe v. Eyre*, 5 C. B. 713; *Robinson v. Wood*, 27 L. J. C. 726. And see *Fearne*, Cont. Rem. 272, on the effect of executory devises as conditionally determining the preceding estate.

(*d*) *Lambarde v. Peach*, 4 Drew. 553; 28 L. J. C. 569; *Muggeridge's Settle-*

*ment*, Johns. 625; 29 L. J. C. 288.

(*e*) *Egerton v. Brownlow*, 4 H. L. C. 1; *Re Greenwood*, [1903] 1 Ch. 749; 72 L. J. C. 281. See *Re Exmouth (Visc.)*, 23 Ch. D. 158; 52 L. J. C. 420.

(*f*) See the distinction explained, *post*, p. 168.

construction and application of conditions in general which may be conveniently treated separately and which will constitute the matter of the third sub-section.

### § 1. CONDITIONAL LIMITATIONS (a).

Fee simple conditional.

Fee tail with proviso for *cesser*—proviso for partial *cesser* void—proviso for *cesser* may be barred.

Estate for life with conditional limitation—proviso for *cesser* on alienation—estate for life terminable at will.

Estate for years determinable upon life or lives—term determinable by notice—proviso for *cesser* of satisfied terms—*cesser* by statute—assignment of satisfied terms to protect a purchaser.

At the common law an estate in fee simple might be made determinable by a conditional limitation, so that upon the happening of a certain event the estate ceased (b). Fee simple conditional.

The limitation “to A. and to the heirs of his body,” or “to A. and the heirs male of his body,” created by the common law a fee simple conditional. The estate was a fee simple in quality; but as to quantity or duration it was determinable by the failure of issue or issue male.—Such limitations were converted by the statute *De donis* into fees tail; but where that statute did not apply, as was the case with land of customary tenure, such limitations, unless there were a special custom of entail in the manor, were, and they still are, construed to give a fee simple conditional, as at common law (c). Fee simple conditional upon issue.

Other ancient instances of fees simple conditional or determinable by the terms of their limitation may be found; but no such limitations could be made of freehold lands after the statute of *Quia emptores*, which prevented the creation of any seignory to which an escheat of the fee, upon the determination of the estate, could attach. Since that statute conditional limitations annexed to a fee simple are, as such, simply void of effect, and the estate is absolute (d).

An estate tail may be created with a conditional limitation, or, as it is here commonly called, a *proviso for cesser*, so that in a Fee tail with proviso for cesser.

(a) As to the various meanings which have been suggested for this expression, see *Re Dugdale*, 38 Ch. D. 176; Sugden's note to *Gilb., Uses*, p. 173; *Fearne, Cont. Rem. c. i. s. 3*, and *Butler's note (h)*, 1b.; *Butler's note (l)* to *Co. Lit.* 203 b; *Fearne, Cont. Rem.* 272; *Sanders, Uses*, 150; *Preston, Shep.*

*Touch.* 117; and see *Preston's* definition of a limitation given *ante*, p. 117.

(b) *Co. Lit.* 1 b, 18 a, 19 b; *Edward Seymour's Case*, 10 Co. 97 b; see *ante*, p. 24.

(c) 1b.; see *ante*, pp. 25, 26.

(d) See *ante*, p. 25; *Collier v. Walters*, L. R. 17 Eq. 252; 43 L. J. C. 216.

certain specified event the estate tail ceases, and the reversion or next vested estate in remainder takes effect in immediate possession (*e*).

Examples of  
proviso for  
cesser.

Instances occur in settlements in which estates tail are limited with the proviso that if the tenant in tail in possession shall refuse or neglect to take the name and arms of the settlor, the estate tail shall cease and determine as if he were dead and there were a failure of issue inheritable under the entail (*f*). A like proviso is sometimes used to determine the estate tail, if the tenant in possession shall neglect to reside upon the land (*g*), or if he shall become entitled to some other settled estate (*h*).

Proviso for  
partial cesser  
void.

A proviso that in a certain event an estate tail shall cease as if the tenant in tail were dead is void; because an estate tail does not determine on death of the tenant in tail, but on death *without issue*, and because the proviso is uncertain in effect as to the intended destination of the property at his death. An estate tail cannot be limited to cease as to a tenant in tail only or during his life only, and to continue as to the other issue in tail; for such a limitation would be repugnant to the estate to which it is annexed (*i*). In the case of a will, the Court would probably supply the words "without issue" in order to effectuate the intention (*k*).

A mere direction in a will that devisees shall take the name and arms of the testator or the like, without words divesting the estate in case of non-compliance, will not operate as a conditional limitation, unless it must be necessarily so construed in order to effectuate the testator's intention (*l*).

Proviso may  
be barred.

The power of disposition of a tenant in tail, extending to the creation of a fee simple absolute as against all persons claiming under or after the determination of the estate tail, is not restricted by a proviso for *cesser*; but such a proviso, in common with all other limitations operating subsequently upon the estate, may be barred by a disentailing assurance executed in the proper form (*m*).

(*e*) *Portington's Case*, 10 Co. 36; *Doe v. Scarborough (Earl)*, 3 A. & E. 2; 4 L. J. K. B. 172. As to limitations over in such cases, see *post*, Chap. II., Sect. II., "Shifting Uses."

(*f*) *Meyrick v. Laws*, L. R. 9 Ch. 237; 43 L. J. C. 521. See *Law Union and Crown Insce. v. Mill*, [1902] A. C. 263; 71 L. J. C. 602.

(*g*) *Johnson v. Fouldes*, L. R. 5 Eq. 268; 37 L. J. C. 260.

(*h*) *Doe v. Yates*, 5 B. & Ald. 544;

*Re Greenwood*, [1903] 1 Ch. 749. See *Fearne*, Cont. Rem. 254, n. (*e*).

(*i*) *Corbet's Case*, 1 Co. 83 b; *Mildmay's Case*, 6 Co. 40 a; *Gulliver v. Ashby*, 4 Burr. 1929; *Bradley v. Peiroto*, 3 Ves. 324; Tnd. L. C. Conv. 514.

(*k*) See 1 Jarman on Wills, 862.

(*l*) *Gulliver v. Ashby*, 4 Burr. 1929; 1 W. Bl. 607.

(*m*) See *ante*, p. 27. See *Doe v. Scarborough (Earl)*, 3 A. & E. 897.

An estate for life may be made determinable by a conditional limitation;—as, if an estate be granted to a woman so long as she is unmarried, or until marriage, or during widowhood; or to a husband or wife during the coverture; or for any like uncertain duration included in the life which determines the estate upon the happening of the event mentioned, the next vested estate in remainder then takes effect, and intervening contingent remainders, if any, are excluded (*n*).

Estate for life with conditional limitation.

An estate for life may be limited to determine on alienation; or upon charging or attempting to charge the estate, or the rents and profits; so it may be limited to cease upon bankruptcy or insolvency (*o*). But while a provision contained in a settlement of the settlor's own property determining his interest upon alienation by him is valid (*p*), a provision in a similar settlement determining his interest upon his bankruptcy is invalid (*q*). An attempt to fetter the right of a tenant for life to exercise his statutory powers of alienation is invalid by force of sect. 51 of the Settled Land Act, 1882 (*r*). Conditions in restraint of alienation cannot be annexed to an estate tail or an estate in fee simple, and in such cases they are void and inoperative, as being repugnant to an inseparable incident of the estate (*s*).

Proviso for ceasing on alienation, etc.

A lease for an uncertain term determinable at the will of the lessee only, executed in a manner to convey the freehold, is an estate for life determinable accordingly (*t*). A lease for an uncertain term purporting to be determinable at the will of the lessee, but not conveying the freehold, as where there was no livery of seisin or other sufficient conveyance of the freehold, was determinable also at the will of the lessor, and created at law only a tenancy at will (*u*). A lease determinable at the will of the lessor is necessarily not a freehold; and in the absence of any other limitation it is a tenancy at will, and is determinable by the lessee also (*x*).

Estate for life determinable at will.

(*n*) *Jones v. Jones*, 1 Q. B. D. 279; 45 L. J. Q. B. 166; *Re Hope Johnstone*, [1904] 1 Ch. 470; 73 L. J. C. 371; Co. Lit. 42 *a*, 214 *a*; *Dickson's Trusts*, 1 Sim. N. S. 37; see *Chapman v. Perkins*, [1905] A. C. 106; 74 L. J. C. 331. As to the validity of limitations over upon marriage, see *Morley v. Rennoldson*, 2 Hare, 570; [1895] 1 Ch. 449; *Allen v. Jackson*, 1 Ch. D. 399; *Re Whiting's Settlement*, [1905] 1 Ch. 96; 74 L. J. C. 207.

(*o*) *Brandon v. Robinson*, 18 Ves. 429; *Wilkinson v. Wilkinson*, 1 Swanst. 515. See *Craven v. Brady*, L. R. 4 Ch. 296; 38 L. J. C. 345.

(*p*) *Brooke v. Pearson*, 27 Beav. 181; *Knight v. Browne*, 30 L. J. C. 649;

*Re Detmold*, 40 Ch. D. 585; 58 L. J. C. 495.

(*q*) *Higinbotham v. Holme*, 19 Ves. 88; *Wilson v. Greenwood*, 1 Swanst. 471. See *Mackintosh v. Pogose*, [1895] 1 Ch. 505; 64 L. J. C. 274.

(*r*) *Re Ames*, [1893] 2 Ch. 479; 62 L. J. C. 685; *Re Smith*, [1899] 1 Ch. 331; 68 L. J. C. 198.

(*s*) *Re Muchu*, 21 Ch. D. 838; *Re Dugdale*, 38 Ch. D. 176; 57 L. J. C. 634.

(*t*) See *ante*, p. 156.

(*u*) Co. Lit. 55 *a*; but it may give an interest in equity. See *King's Leaseholds*, L. R. 16 Eq. 521; *Zimble v. Abrahams*, [1903] 1 K. B. 577; 72 L. J. K. B. 103.

(*x*) See *ante*, p. 156.

Lease for years determinable upon life or lives.

An estate for years may be made determinable by a conditional limitation, as the continuance of a life or lives or other uncertain event. Thus, a lease for 100 years, if A. shall so long live, creates a term of years determinable upon the death of A.; and upon the death of A. there is no residue of the *term*, though there may be a residue of the years, so that a limitation over for the residue of the *term* is void, unless by *term* is meant the *time* and not the interest (*y*). A lease for so many years as A. shall live, not being limited by any certain period, is not an estate for years, but a freehold or an estate for life (*z*).—An estate for 100 years, if A. and B. shall so long live, determines upon the death of either of them; but an estate for the lives of A. and B. continues until the death of the survivor (*a*).

Lease during minority.

A lease during the minority of A. is a lease for the number of years A. wants of twenty-one, if he shall so long live (*b*).

Term determinable by notice.

An estate for years certain may be made determinable by notice to be given by either party (*c*); but a lease for so long as the lessee pleases to continue tenant, being otherwise unrestricted, is an estate for life terminable at the will of the lessee (*d*).

Proviso for the *cesser* of satisfied terms.

A proviso for *cesser* is often applied to long terms of years created for various purposes, with the object and effect of making the terms to cease when the purposes of their creation have been satisfied. The terms referred to are used for the purpose of securing the payment of sums of money, as debts upon mortgage, or the sums to be raised for the jointures of widows and the portions of children in family settlements. The term is vested in trustees upon trust to raise and pay the charges imposed, and, subject thereto, upon trust for the owners of all other estates in the land in the order of their limitation, or, as it is called, upon trust *to attend the inheritance*.

A term settled in this manner does not interfere with the beneficial ownership of the land until the occasion of the charge arises, and it then affords the ready means of raising the sum charged by an actual receipt of the rents and profits, or, if necessary, by a sale or mortgage. The efficacy of the term for this purpose by reason of the length, which is sometimes extended to 500 or 1000 years, is equivalent to the fee simple, while, being only a chattel interest, it in no way interferes

(*y*) *Wright v. Cartwright*, 1 Burr. 282; Co. Lit. 45 *b*.

(*z*) *Brewer v. Hill*, 2 Anstr. 413; Co. Lit. 42 *a*, 45 *b*.

(*a*) *Bruduel's Case*, 5 Co. 9 *a*.

(*b*) *Bath's (Bp.) Case*, 6 Co. 35 *b*;

see *Boraston's Case*, 3 Co. 19 *a*.

(*c*) *Doe v. Baker*, 8 Taunt. 241. See *ante*, p. 152.

(*d*) *Zimble v. Abrahams*, [1903] 1 K. B. 577; 71 L. J. K. B. 103.

with the limitation, transfer, or devolution of the freehold subject to the term.

Formerly, if there were no express proviso for *cesser* upon the purposes of the term being satisfied, the term, unless exhausted by those purposes, and unless surrendered to the tenant of the freehold (and after lapse of time such a surrender might be presumed), continued as attendant upon the inheritance, and entitled the immediate freeholder to the beneficial interest; and if not expressly declared to be attendant in its original creation, it became so by construction of equity.

Satisfied terms attendant upon the inheritance.

But the term is now disposed of by the Satisfied Terms Act, 1845, which enacts by sect. 2, "that every term of years now subsisting or hereafter to be created, becoming satisfied after 31st December, 1845, and which either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine" (*e*).

*Cesser* of satisfied terms by statute.

Sect. 1 of the statute provided in like manner for the *cesser* of terms which upon the 31st December, 1845, were attendant upon the inheritance, except as to the protection to which any person might then be entitled therefrom. The protection in question was obtained by a purchaser or mortgagee of the inheritance procuring an assignment of the term to be made to a trustee on his behalf, instead of taking an assignment to himself whereby it would become merged and cease. He had then the protection of the prior title of the term against any intervening dealings with the inheritance of which he had no notice (*f*).

Assignment of satisfied terms to protect purchaser.

(*e*) 8 & 9 Vict. c. 112. See Carson's 47; *Wynn v. Williams*, 5 Ves. 130; R. P. Stat. pp. 522 *et seq.* *Maundrell v. Maundrell*, 10 Ves. 246,

(*f*) *Willoughby v. Willoughby*, 1 T. R. 763; *Goodtitle v. Jones*, 7 T. R.

270.

## § 2. CONDITIONS.

- Condition—distinguished from conditional limitation—words of limitation—words of condition.
- Condition annexed to freehold—operates by entry or claim.
- Condition annexed to leasehold—requires no entry unless so stipulated—construction of conditions in leases.
- Condition can be reserved only to the grantor and his heirs—was not assignable at common law—distinction as to the reversion upon a conditional limitation.
- Waiver of condition—cannot be retracted—cannot operate after avoidance—effect of writ in ejectment as election to avoid.
- Effect of entry in avoiding the estate—effect upon mesne estate and charges—upon remainders and ulterior limitations.
- Conditions implied in tenure—expressed in the grant—effect of the statute *Quia emptores*.
- Conditions in mortgages at common law—equity of redemption.
- Conditions in leases for payment of rent—for performance of covenants.

Condition distinguished from conditional limitation.

A condition, strictly so called, differs in operation from a conditional limitation. An estate upon condition is not void, but voidable only by entry or claim under the condition; and unless the right of avoidance is exercised the estate continues. A conditional limitation determines the estate *ipso facto* by mere force of the terms, leaving, in the case of particular estates, the next vested remainder, or the reversion, to take effect in immediate possession (*a*).

Hence it may be observed that a condition annexed to an estate with a conditional limitation, purporting to defeat the estate in the same event which determines it by the express limitation, as in the case of a gift to a man in tail, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, would be inoperative and therefore a void condition (*b*).

Distinction in construction.

It has been said that the distinction between words of limitation and words of condition lies in the terms used; but it is, perhaps, more correct to say that it depends rather upon the intention and effect than upon the exact letter of the words (*c*).

(*a*) Co. Lit. 214 *b*; Shepp. Touch. by Preston, Ch. vi. As to the acceleration of the remainder, see *Lambarde v. Peach*, 4 Drew. 553; 28 L. J. C. 569; a remainder which is contingent at the time the conditional limitation takes effect, fails altogether, unless saved by the Contingent Remainders Act, 1877; see *ante*, p. 34.

(*b*) Co. Lit. 224 *b*. But a condition may have a more extensive effect than a conditional limitation, by defeating all the estates in remainder limited under the same feoffment or grant, see *post*, p. 173.

(*c*) *Portington's Case*, 10 Co. 41; Shepp. Touch. by Preston, p. 121; 1 Sanders, Uses, 155.



Apt words of limitation are :—" *durante*, as *durante viduitate* or *durante vitâ*, etc.—*dum*, as *dum sola fuerit*,—*dummodo*, as *dummodo solveret talem redditum*,—*quamdiu*, as *quamdiu se bene gesserit*, *quamdiu* the grantor shall be dwelling upon the manor, —and so by these words, *donec*, *quousque*, *usque ad*, *tamdiu*, *ubicunque* " (*d*).

Words of limitation.

Words of condition are, *sub conditione*, *proviso*, *ita quod*, *si contingat*, etc. (*e*). And "it is to be observed that many words in a will do make a condition in law, that make no condition in a deed" (*f*).

Words of condition.

There is a difference in the operation of a condition annexed to a freehold, and a condition annexed to a lease for years, arising from the difference in quality of those estates. A freehold estate commencing, at common law, by livery cannot be divested under a condition without a resumption of the seisin by entry, hence the condition, though expressly worded that upon a certain act or event the estate shall cease and be void, imports only that a right of entry is given to avoid it; the estate does not become *ipso facto* void under the condition, but voidable only by entry (*g*).

Condition annexed to freehold requires re-entry.

"Regularly, when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim, and the reason is, for that a freehold and inheritance shall not cease without entry or claim" (*h*).

Or claim.

The *claim* above referred to applies to things which do not lie in livery and of which there can be no entry or possession. Thus, "of a reversion or remainder, of a rent or common or the like there must be a claim before the estate be revested in the grantor by force of the condition, and that claim must be made upon the land. *A fortiori*, in case of a feoffment which passeth by livery of seisin, there must be a re-entry by force of the condition before the estate be void" (*i*).

(*d*) Co. Lit. 234 *b*, 235 *a*; *Portington's Case*, 10 Co. 41 *b*; *Re Moore*, 39 Ch. D. 116; 57 L. J. C. 936.

(*c*) *Cromwell's (Lord) Case*, 2 Co. 69 *b*; *Portington's Case*, 10 Co. 42 *b*; *Doe v. Watt*, 8 B. & C. 308; *Cartwright v. Cartwright*, 3 De G. M. & G. 982. And see the rules for distinguishing and construing conditions stated, Shepp. Touch. by Preston, p. 121.

(*f*) Co. Lit. 236 *b*; and see 2 Jarman, Wills, 841.

(*g*) Co. Lit. 214 *b*; *Pennant's Case*, 3 Co. 64 *a*; notes to *Duppa v. Mayo*, 1 Wms. Saund. 441.

(*h*) Co. Lit. 218 *a*. A freehold may

cease or end *ipso facto* under a *conditional limitation* by the terms of its creation. See Co. Lit. 214; *ante*, p. 163 *et seq.*

(*i*) Co. Lit. 218 *a*; in the case of a rent charge out of the grantor's own land upon condition, if the condition be broken, the grantor being in possession need make no claim upon the land; the law will adjudge the rent void without any claim. *lb.* The statute enacting that corporeal hereditaments shall now lie in grant applies in terms only "as regards the conveyance of the immediate freehold," and though it dispenses with livery to commence an

Condition annexed to lease for years does not require entry unless so stipulated.

"A lease for years may begin without ceremony, and so may end without ceremony," being at common law a mere matter of contract. Therefore a condition to defeat it does not require an actual entry, unless expressly stipulated for (*k*). According to the older cases, a condition that in a certain event a lease should cease or be void was construed as a conditional limitation, and the term treated as *ipso facto* void; but the later cases show that in these circumstances the condition is construed to render the lease voidable at the option of the lessor, who must give notice, or do some other act showing his intention to avoid it (*l*). If the view expressed in the earlier cases had prevailed, it would have permitted the lessee to put an end to the term by his own default. And where a right of re-entry is expressed to be given upon an antecedent notice, the election of the lessor to resume possession is finally exercised by notice given, and it is unnecessary to make an actual entry (*m*).

Construction of conditions in leases.

*Proviso* operating as a condition.

"In a lease for years no precise form of words is necessary to make a condition. It is sufficient if it appear that the words used were intended to have the effect of creating a condition. They must be the words of the landlord because he is to impose the condition" (*n*).—"And so it is if a man by indenture letteth lands for years, *provided* always, and it is *covenanted and agreed* between the said parties, that the lessee shall not alien, and it was adjudged that this was a condition by force of the *proviso*, and a covenant by force of the other words" (*o*).—And it is laid down as "a general rule that where a proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it would be void; but if a penalty is annexed, it is otherwise" (*p*).

Condition can be reserved only to the grantor and his heirs.

A condition can be reserved in a conveyance at common law only to the grantor or lessor of the estate and to his heirs, and to no other person (*q*). If a devise be made by will upon condition, the heir of the testator would be entitled to enter upon breach of the condition (*r*). A condition may be reserved upon

estate of freehold, it does not affect the rule requiring an actual entry to revest the freehold under a condition. See *ante*, p. 36.

(*k*) *Doe v. Baker*, 8 Taunt. 241; Co. Lit. 214 *b*. See *Liddy v. Kennedy*, L. R. 5 H. L. 134, 151, 154.

(*l*) *Rede v. Farr*, 6 M. & S. 121; *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Morre v. Ullecoats Mining Co.*, [1908] 1 Ch. 575; notes to *Duppa v. Mayo*, 1 Wms. Saund. 442.

(*m*) *Liddy v. Kennedy*, L. R. 5 H. L. 134.

(*n*) *Doe v. Watt*, 8 B. & C. 308, 315; *Doe v. Phillips*, 2 Bing. 13; *Doe v. Kennard*, 12 Q. B. 244.

(*o*) Co. Lit. 203 *b*; *Doe v. Watt*, 8 B. & C. 308.

(*p*) *Doe v. Watt*, 8 B. & C. 316, and see the cases there cited.

(*q*) Co. Lit. 214 *a*, 379 *a*; *Fitchet v. Adams*, 2 Stra. 1128.

(*r*) See *Doe v. Pearson*, 6 East, 173.

a conveyance in fee simple, leaving no reversion; or upon an assignment of a term of years, leaving no reversion (s).

A condition was not assignable at common law, either with or without a reversion; but it was made to pass with a reversion in certain cases by 32 Hen. VIII. c. 34 (t); and by 8 & 9 Vict. c. 106, s. 6, "a right of entry, whether immediate or future, and whether vested or contingent, may be disposed of by deed."

Condition not assignable at common law.

Hence arose a diversity, as stated by Coke, "between a condition that requireth a re-entry, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort no stranger shall take any advantage, as hath been said. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, until J. S. come from Rome, the lessor grant the reversion over to a stranger; J. S. comes from Rome, the grantee shall take advantage of it and enter, because the estate by express limitation of it was determined. So it is if a man make a lease to a woman *quandiu casta vixerit*, or if a man make a lease to a widow, *si tamdiu in purâ viduitate viveret*. So it is if a man make a lease for 100 years if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, *causâ quâ supra*" (u).

Distinction as to reversion upon conditional limitation.

The forfeiture under a condition is waived and dispensed with, if the grantor or lessor, after having knowledge of the grounds of forfeiture, does any act unequivocally affirming the continuance of the estate or tenancy; as by accepting, suing for, or claiming rent subsequently accruing due (v). Distraining for rent may have the same effect of affirming the tenancy, because it is only justifiable during the continuance of the tenancy or (by the statute 8 Anne, c. 14, s. 6,) within six months after its determination (x).

Waiver of condition.

Such acts of waiver of the forfeiture operate as an election not to avoid the estate, which when once made and duly expressed cannot be retracted; according to the maxim "*quod semel placuit in electionibus amplius displicere non potest*" (y). But they operate

Cannot be retracted.

(s) Co. Lit. 202 a, 202 b; *Doe v. Bateman*, 2 B. & Ald. 168.

(t) As to this statute and when it applies, see *Spencer's Case*, 5 Co. 16; 1 Smith, L. C. 52; notes to *Duppa v. Mayo*, 1 Wms. Saund. 449; Leake, Contracts, 858.

(u) Co. Lit. 214 b; *Manning's Case*, 8 Co. 95 b.

(v) *Doe v. Allen*, 3 Taunt. 78; *Doe v. Birch*, 1 M. & W. 402; *Dendy v.*

*Nicholl*, 4 C. B. N. S. 376; *Croft v. Lumley*, 5 E. & B. 648. See notes to *Dumpr's Case*, 1 Smith, L. C. 32, and *Duppa v. Mayo*, 1 Wms. Saund. at p. 444 *et seq.*

(x) *Ward v. Day*, 4 B. & S. 337; 33 L. J. Q. B. 3; *Grimwood v. Moss*, L. R. 7 C. P. 360. See *Cox v. Leigh*, L. R. 9 Q. B. 333; 43 L. J. Q. B. 123.

(y) *Jones v. Carter*, 15 M. & W. 718; *Croft v. Lumley*, 5 E. & B. 648; 6

only upon past breaches or forfeitures; and if the breach be a continuing one, a subsequent breach will give a new right of entry (*z*).

Waiver cannot operate after avoidance of the estate.

On the other hand, where the election is duly made by entry or otherwise to avoid the estate, or where it becomes *ipso facto* void under the condition or limitation, no acceptance of rent or other act of waiver can afterwards revive or continue it (*a*). But such acts may be evidence of a new tenancy (*b*).

Effect of ejectment as election to avoid.

The service of a writ of ejectment, by treating the tenant as a trespasser, operates as a conclusive election to avoid a lease, and it may be referred back to the earliest breach or ground of forfeiture upon which the plaintiff relies in support of the action. It therefore precludes the lessor from suing for subsequent rent or subsequent breaches under the lease. And, on the other hand, it prevents any subsequent act, as distraining for or accepting the rent in arrear, from operating as a waiver of the forfeiture upon which the ejectment is founded (*c*).

Entry avoids the estate of the grantee, and reverts it in the grantor.

Upon entry the estate to which the condition is annexed is avoided, and the original estate of the grantor or lessor is revested in him or in his representatives so far as the circumstances permit. "Regularly it is true that he that entereth for a condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition, but yet this faileth in many cases:—1. In respect of impossibility,—2. In respect of necessity,—3. In respect of some collateral qualities" (*d*).

But the right of action remains on covenants in a lease for arrears of rent or breaches committed before re-entry; and it was so held notwithstanding the proviso expressed that the lessor upon re-entry should have the premises again "as if the indenture of lease had never been made" (*e*).

Cannot avoid it in part only.

A condition, like a conditional limitation, must in general defeat or determine the whole estate to which it is annexed. It cannot avoid the estate in part only, and continue it in part.

H. L. C. 672; *Ward v. Day*, 5 B. & S. 359.

(*z*) *Doe v. Peck*, 1 B. & Ad. 428; *Doe v. Gladwin*, 6 Q. B. 953; *Doe v. Jones*, 5 Ex. 498; *Thomas v. Lulham*, [1895] 2 Q. B. 400. See *post*, p. 180.

(*a*) Co. Lit. 215 *a*; *Pennant's Case*, 3 Co. 64 *b*. See *Toleman v. Porbury*, L. R. 6 Q. B. 245; L. R. 7 Q. B. 344; 41 L. J. Q. B. 48. "A confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law." Co. Lit. 295 *b*.

(*b*) See *Blyth v. Dennett*, 13 C. B. 178; 22 L. J. C. P. 79.

(*c*) *Jones v. Carter*, 15 M. & W. 718; *Grimwood v. Moss*, L. R. 7 C. P. 360; 41 L. J. C. P. 239; *Serjeant v. Nash, Field & Co.*, [1903] 2 K. B. 304; 72 L. J. K. B. 630. See *Moore v. Ullcoats Mining Co.*, [1908] 1 Ch. 575.

(*d*) *Hoddy v. Hoddy*, 2 Rolle, 60; Co. Lit. 201 *a*; and see 202 *a*, where the instances are given.

(*e*) *Hartshorne v. Watson*, 4 Bing. N. C. 178.

Thus a proviso for the *cesser* of an estate tail, during the life of the tenant in tail only, is repugnant and void (*f*).

Entry also avoids all mesne estates and incumbrances created out of or charged upon the estate (*g*). But conditions implied in law, as the conditions of tenure, do not affect the estates and incumbrances created before the act of forfeiture (*h*).

Avoids mesne estates and charges.

At common law if the land be limited for a particular estate with remainders, subject to a condition, the re-entry defeats all the estates in remainder, as being dependent upon the seisin of the particular estate (*i*). But where a particular estate is limited subject to a condition, and a remainder is limited over independently of that condition, as the entry would defeat the remainder, the condition, unless it can be construed as a limitation determining the preceding estate without entry so as to support the remainder, is repugnant and void (*k*).

Avoids estates in remainder.

A condition of re-entry has no effect upon springing uses and executory devises which operate in substitution of the estate to which the condition is annexed; for these limitations arise quite independently of the preceding estate (*l*).

Does not avoid springing uses and executory devises.

At common law the services and duties of the tenure constituted an implied condition of the continuance of the estate; a refusal of the services or a denial of the tenure was visitable with forfeiture, and entitled the lord or reversioner to re-enter and resume possession. Other conditions might be annexed in express terms to the grant of an estate with the like effect of giving to the grantor or his heirs the right to re-enter and resume possession upon breach of the condition (*m*).

Conditions implied in tenure.

Conditions expressed in the grant.

By the common law, it was a condition in law annexed to the estate of tenant for life or for years or other particular estate, that if he made a tortious alienation of the seisin it was a forfeiture of his estate, and the reversioner or remainderman might enter; so if he claimed a greater estate in a court of record. But conveyances have no longer any tortious operation (*n*).

Condition in law against tortious conveyance.

(*f*) *Corbet's Case*, 83 *b*; *Mildmay's Case*, 6 Co. 40 *a*. See *Jones v. Hancock*, 4 Dow, 145.

(*g*) *Simonds v. Lawnd*, Cro. El. 239; *Creswell v. Davidson*, 56 L. T. 811. See *G. W. Ry. v. Smith*, 2 Ch. D. 235; and see *Margow's Case*, 1 Co. 146 *b*.

(*h*) Co. Lit. 233 *b*, where see the distinction as to conditions by statute; *Archer's Case*, 1 Co. 67 *a*.

(*i*) *Fearne*, Cont. Rem. 261, 262; 1 *Sanders*, Uses, 152. See *ante*, p. 33.

(*k*) *Fearne*, Cont. Rem. 270; *Shepp. Touch.* by Preston, 120, 121. See

*Kinnersley v. Williamson*, 39 L. J. C. 788, where it was held that a remainderman has no equity to compel the tenant for life to perform a condition. In a devise by will a condition may be annexed to the particular estate only without affecting the remainder. *Warren v. Lee*, Dyer, 126 *b*.

(*l*) See *ante*, pp. 50, 88.

(*m*) Butler's note (1) to Co. Lit. 201 *a*; Co. Lit. 233 *b*; Butler's note to *Fearne*, Cont. Rem. p. 382.

(*n*) Co. Lit. 233 *b*. See *ante*, pp. 40, 41.

Entry was necessary on the part of the lessor to avoid the estate, whether it was a freehold or leasehold, in respect of the conditions implied in the tenure (*o*).

Express conditions not affected by statute *Quia emptores*.

The right of entry for breach of the conditions implied in the tenure could not be reserved upon an alienation in fee after the statute *Quia emptores*, for that statute prohibited the creation of a sub-tenure and the grantee held only of the chief lord of the fee; but a right of entry upon positive conditions expressed in the grant, may be reserved to the grantor and his heirs notwithstanding the statute *Quia emptores* (*p*).

Condition in mortgage at common law.

Express conditions of re-entry were employed at common law in mortgages of land. The mortgagor conveyed the land to the mortgagee by feoffment, or other appropriate legal assurance, upon condition that if he paid at a certain day the amount of the debt he might re-enter and resume his former estate (*q*).

Equity of redemption.

On failure to perform the condition by payment at the day appointed, the estate of the mortgagee became absolute and indefeasible at law; but the Court of Chancery, regarding the transaction merely as a pledge of the land for the debt, allowed to the mortgagor a right or equity of redemption, giving the mortgagee at the same time the right of applying to the court to bar the equity of redemption in default of payment by an appointed day (*r*).

Conditions in leases for payment of rent.

A condition of re-entry is frequently applied to secure the payment of rents reserved, in addition to the other remedies by action or distress (*s*). At common law a condition of re-entry simply "if the rent be in arrear" implies several subordinate conditions, which must be strictly complied with at all points in order to maintain a forfeiture and re-entry. These may be summed up in the requirement that a demand must be first made of the precise sum due, and at the exact time and place required by law under the various circumstances of the case (*t*).

Demand necessary at common law.

Statute enabling ejectment without demand or entry.

By sect. 210 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which replaces an earlier enactment to the same effect, in all cases between landlord and tenant, the landlord may recover in ejectment upon proof that half-a-year's rent was due before the writ was served, and that no sufficient distress

(*o*) See *Fenn v. Smart*, 12 East, 444.

(*p*) Lit. s. 325; Co. Lit. 201 *a*. See *ante*, pp. 12, 170; *Doe v. Bateman*, 2 B. & Ald. 168, 170.

(*q*) Co. Lit. 205 *a*, *b*.

(*r*) See *post*, pp. 203 *et seq.*

(*s*) Co. Lit. 201 *a et seq.*

(*t*) See the requirements of the common law to be observed before a reversioner was entitled to re-enter stated note (11) to *Duppa v. Mayo*, 1 Wms. Saund. at p. 434, and Co. Lit. 201 *b*.

was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, the necessity for a formal demand and re-entry being then dispensed with (*u*).

If the condition of re-entry expressly provides for the time and manner of demanding the rent, or adds any other conditions precedent to the right of re-entry, such express provisions may supersede the implied conditions of the common law, and must be duly complied with (*x*).

Condition expressly stipulating for demand, etc.

A condition of re-entry is also used for securing the due performance of covenants in leases, by giving a right of re-entry upon a breach of covenant, as with covenants to repair and to insure, covenants respecting the mode of occupying and using the premises and the like. Where the proviso for re-entry uses apt words, the power of re-entry may be just as well reserved for breaking a *negative* covenant, as for not performing a *positive* one (*y*).—"An assignee of such an estate takes it subject to the condition, and liable to be divested by the breach of it. It is immaterial, in this respect, whether the condition is for the performance of some covenant which touches the land, and runs with it, or one which is wholly collateral. Upon the breach of either species of covenant, the estate ceases when the lessor chooses to take advantage of his right of re-entry" (*z*).—The entry for a forfeiture does not bar the remedy for the rent in arrear or breach occasioning the forfeiture, or for previous rent or breaches, under the covenants or contract contained in the lease (*a*).

Conditions for performance of covenants.

Remedy for past rent and breaches of covenant.

(*u*) As to the construction of this statute, see note (11) to *Duppa v. Mayo*, 1 Wms. Saund at p. 436.

(*x*) *Phillips v. Bridge*, L. R. 9 C. P. 43; 43 L. J. C. P. 13, and see the cases there cited upon the construction of such conditions.

(*y*) *Tuleman v. Portbury*, L. R. 7 Q. B. 344; 41 L. J. Q. B. 98; *Harman v. Ainslie*, [1904] 1 K. B. 698; 73

L. J. K. B. 539.

(*z*) *Per curiam*, *Doe v. Peck*, 1 B. & Ad. 428, 436. As to the right of the assignee of the lessor to the benefit of conditions, see *ante*, p. 171.

(*a*) *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Blore v. Giuliani*, [1903] 1 K. B. 357; 72 L. J. K. B. 114. See *Att.-Gen. v. Cox*, 3 H. L. C. 240; *Price v. Worwood*, 4 H. & N. 512.

## § 3. CONSTRUCTION AND APPLICATION OF CONDITIONS.

Illegal and impossible conditions void—examples.

Conditions void for uncertainty.

Conditions void as repugnant to the estate limited.

Construction of conditions—conditions construed as subsequent rather than precedent—construed strictly in favour of vesting, and against divesting—condition of re-entry.

Conditions determined by licence—statute restricting licence to specific act—waiver of breach restricted to specific instance.

Relief against forfeiture—by the court—statutory.

There remain to be noticed in this sub-section some rules and doctrines of law relating to conditions generally, and the construction and application of conditions.

Illegal and impossible conditions are void.

Conditions which in their matter or object are illegal or impossible, are void and inoperative. Hence, if the condition be precedent, that is, if the estate be limited to arise upon such a condition, both the condition and the estate are void; if the condition be subsequent, that is, if the estate be determinable upon such a condition, whether as a conditional limitation or as a condition of re-entry, the condition only is void, and the estate good and absolute. And the same rules apply whether the condition be illegal or impossible at the time of limiting the estate, or whether it become so afterwards (*a*).

Examples,—conditions in restraint of marriage.

In the case of personal property, the Court of Chancery adopted the rule of the civil law with modifications, and conditions in general restraint of marriage were held to be bad (*b*). But the better opinion seems to be that conditions in restraint of marriage when attached to gifts of land are not *per se* invalid (*c*).

The proceeds of sale of land are treated as personal estate for the purpose of this rule, and a condition in general restraint of marriage will be held to be void (*d*). A condition subsequent defeating an interest given in the event of marriage without the consent of a named person is a partial restraint and valid (*e*), but if the condition cannot be complied with by reason of the

(*a*) *Roundel v. Carrer*, 2 Bro. C. C. 67; *Corbett v. Corbett*, 14 P. D. 7; *Ridgway v. Woodhouse*, 7 Beav. 437; *Partridge v. Partridge*, [1891] 1 Ch. 351; 63 L. J. C. 122; *Re Greenwood*, [1903] 1 Ch. 749; 72 L. J. C. 281. See *Re Moore*, 39 Ch. D. 116; *Re Croxon*, [1904] 1 Ch. 252; 73 L. J. C. 170.

(*b*) *Scott v. Tyler*, 2 Bro. C. C. 431; 1 Wh. & T. L. C. Eq. 535.

(*c*) See notes to *Scott v. Tyler*, *supra*.

(*d*) *Bellairs v. Bellairs*, L. R. 18 Eq. 510; 43 L. J. C. 669.

(*e*) *Re Whiting's Settlement*, [1905] 1 Ch. 96; 74 L. J. C. 207.



death of the person whose consent is necessary, the condition is discharged, and the gift remains absolute (*f*).

Lands were devised by will for estates tail to the heirs male of the body of A. with a proviso that if A. should die without having acquired the title of Duke or Marquis of B. to him and the heirs male of his body, the estates so devised should cease and be void; it was held that the proviso was a condition subsequent and was void as being contrary to public policy, and that consequently the estates were absolute (*g*).—Where a devise was made upon condition that the devisee should convey part of the devised estate to a charity, the condition was held illegal and void and the devise absolute (*h*).—A devise to A. was conditioned to be void if he should refuse upon request to convey an estate to B., the testator having subsequently to the making of his will rendered the condition impossible by himself purchasing the estate, the devise was held to be absolute (*i*).

Other examples.

If a condition is so expressed that it is impossible to ascertain with certainty the event or contingency upon which the estate is to arise or be defeated, it is equivalent to being impossible and is equally inoperative (*k*). So also, if it be expressed with such uncertainty that it is impossible to say what is the effect intended as to the destination of the property; as where an estate in fee or an estate tail is limited to cease and go over as if the tenant were dead (*l*). And generally if there be a limitation over which does not meet the event on which a previous estate is to cease, there is, in general, not sufficient certainty to determine the previous estate before the limitation over takes effect (*m*).

Condition void for uncertainty.

So, if the condition be in the event uncertain, it is inoperative; thus “if a lease be made to a man and a woman for their lives upon condition that which of them two shall first marry, that one shall have the fee, and they intermarry, neither of them shall have the fee, for the uncertainty” (*n*).

A condition annexed to an estate which is repugnant to the estate limited is void. Thus, a condition that tenant in fee

Conditions repugnant to the estate.

(*f*) *Aislabie v. Rice*, 3 Madd. 256; 1 Taunt. 459.

(*g*) *Egerton v. Brownlow*, 4 H. L. C. 1.

(*h*) *Poor v. Miall*, 6 Madd. 32.

(*i*) *Walker v. Walker*, 2 De G. F. & J. 255; 29 L. J. C. 856.

(*k*) *Sheppard's Touch.* by Preston, 128; *Fearne*, Cont. Rem. 255; *Fillingham v. Bromley*, Turn. & Russ. 530; *Doe v. Carew*, 2 Q. B. 317; *Clavering*

*v. Ellison*, 7 H. L. C. 707; 8 De G. M. & G. 662; 3 Drew. 451.

(*l*) *Re Cutt's Trusts*, 2 H. & M. 46; 33 L. J. C. 495; *Musgrave v. Brooke*, 26 Ch. D. 792; 54 L. J. C. 102. See *ante*, p. 164.

(*m*) *Cutt's Trusts*, 2 H. & M. 46; 33 L. J. C. 495; *Musgrave v. Brooke*, 29 Ch. D. 792; 54 L. J. C. 102.

(*n*) Co. Lit. 218 a.

Condition  
against  
alienation.

simple or tenant in tail shall not alien the land is repugnant and void, because the power of alienation is an inseparable incident of such estates (*o*). So a condition annexed to an estate purporting to dispose of it in case of intestacy is repugnant to an absolute interest and void (*p*). A condition that if a devisee take any proceedings at law or in equity his estate shall go over will be held limited to groundless and frivolous litigation, and to this extent upheld (*q*).

Condition  
against taking  
the profits.

A condition annexed to an estate in fee simple or fee tail that the tenant shall not take the profits of the land is repugnant and void (*r*). So, a condition that the land shall be let for ever at a definite rent (*s*).

Construction  
of conditions.

It is a general principle of construction that conditions are not favoured, that is to say, limitations of estates in terms importing conditions are to be construed generally in favour of vested and indefeasible estates (*t*).

Condition  
construed as  
subsequent  
rather than  
precedent.

Hence the rule that ambiguous expressions, imposing a condition annexed to an estate, are to be construed as a condition subsequent rather than a condition precedent (*u*).

Words of con-  
tingency re-  
ferred to the  
limitation  
over.

In the next place, words of contingency are referred, if possible, to the limitation over; thus, a devise to A., "if he should live to attain twenty-one," or "when he attains twenty-one," with a devise over in case he should die before attaining that age, is construed as giving to A. an immediate vested estate, subject to be divested by the devise over taking effect upon his death under twenty-one (*x*).

Conditions  
construed  
strictly in  
favour of  
vesting and  
against  
divesting.

Hence also the rule that a condition precedent is construed *strictly* in favour of vesting the estate, and slight circumstances will be seized upon to excuse an exact compliance with its terms;

(*o*) *Mildmay's Case*, 6 Co. 41 *a*; *Portington's Case*, 10 Co. 36. See *King v. Burchell*, 1 Eden, 424; *Hayes v. Foorde*, 1 W. Bl. 698.

(*p*) *Holmes v. Godson*, 8 De G. M. & G. 152; 25 L. J. C. 317. See *Comiskey v. Bowring Hanbury*, [1905] A. C. 84; 74 L. J. C. 263.

(*q*) *Rhodes v. Maxwell Hill Land Co.*, 29 Beav. 560; 30 L. J. C. 509; *Adams v. Adams*, [1892] 1 Ch. 369; 61 L. J. C. 237.

(*r*) Co. Lit. 206 *b*; *Perkins*, s. 731; *Sheppard Touch*, by Preston, 131.

(*s*) *Att.-Gen. v. Catharine Hall*, Jac. 381. See *Tibbetts v. Tibbetts*, 19 Ves. 656; Jac. 317.

(*t*) This principle of construction finds its chief application in construing

future limitations; as remainders which are to be taken as vested rather than contingent, and executory limitations and devises which are to be taken as referring to the time of possession rather than the vesting of the interest, see *post*, Chap. II. Sects. I., III.

(*u*) *Egerton v. Brownlow*, 4 H. L. C. 1; *Woodhouse v. Herrick*, 1 K. & J. 352; 24 L. J. C. 649; *Re Greenwood*, [1903] 1 Ch. 749; 72 L. J. C. 281.

(*x*) *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313; *Doe v. Moore*, 14 East, 601; *Phipps v. Ackers*, 9 Cl. & F. 583; *Muskett v. Eaton*, 1 Ch. D. 435. See *Re Francis*, [1905] 2 Ch. 295, and see *post*, Chap. II. Sect. III. "Executory Devise."

and conversely that a condition subsequent is construed *strictly* against divesting the estate, and restricted to cases falling within the language of the condition (*y*).

Upon the above principles of construction a condition of re-entry reserved to a grantor or lessor, without any express extension to heirs, executors, etc., is restricted to the person of the grantor or lessor, and the heir or executor cannot take advantage of it (*z*).—And for analogous reasons in an action of ejectment founded on a condition of re-entry, the burden of proving all the circumstances divesting the estate, though involving negative matter, is cast by law upon the person maintaining the forfeiture (*a*).

Condition of re-entry.

Burden of proving forfeiture.

According to the same principles, a condition of re-entry in a lease upon assignment without licence was held at the common law not to be apportionable; and a licence once given dispensed with the condition altogether, so that no subsequent alienation without licence could break the condition or give cause of entry to the lessor. And a licence given to assign to one particular person, or in one particular instance, had the same effect, in dispensation and determination of the condition, as a licence given to assign generally (*b*).

Condition against assignment determined by licence.

But by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 1, a licence to do any act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease, extends only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence);—and the condition or right of re-entry remains in force in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done. Section 2 restricts in like manner the operation of a licence to assign or underlet or do any other act given to one of several lessees, or given in respect of part of the property.

Effect of licence restricted by statute.

A waiver of a breach of the condition against assignment had

(*y*) *Fraunces' Case*, 8 Co. 90 *b*; 231; 76 L. J. C. 89.  
*Clacering v. Ellison*, 7 H. L. C. 707; (z) Shepp. Touch. 133.  
 29 L. J. C. 761; *Kiallmark v. Kiallmark*, (a) *Doe v. Whitehead*, 8 A. & E. 571;  
 26 L. J. C. 1; *Rudford v. Willis*, L. R. 7 Ch. 7; 41 L. J. C. 19; *Yates v. Univ. Coll., London*, L. R. 7 H. L. 438; *Re Exmouth (Vise.)*, 23 Ch. D. 158; 52 L. J. C. 420; *Re Wright*, [1907] 1 Ch. 231; 76 L. J. C. 89.  
 (a) *Doe v. Whitehead*, 8 A. & E. 571; *Toleman v. Portbury*, L. R. 5 Q. B. 288. See S. C. L. R. 7 Q. B. 344.  
 (b) *Dumpor's Case*, 4 Co. 119; 1 Smith, L. C. 32 and notes.

Waiver restricted to the specific instance or breach waived.

the same effect as a licence in dispensation of the condition altogether (c) ; but since the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 6, an actual waiver of the benefit of any covenant or condition in any lease in any one particular instance does not extend to any instance or any breach of covenant or condition other than that instance or breach of covenant or condition to which such waiver shall specially relate, and is not a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

Relief against forfeiture.—  
By the court.

Courts of common law disclaimed any jurisdiction to relieve against a forfeiture, but courts of equity exercised an original jurisdiction in some cases to relieve against forfeiture at law for conditions broken in cases admitting of a monetary compensation, or where parties could be restored to their original rights (d). But courts of equity gave no relief against forfeitures arising from breach of a condition not to assign without licence, or from breach of a covenant to repair, or to insure against fire, or the like specific matters (e). Courts of equity have, in general, no jurisdiction to relieve against conditions imposed by a testator in his will ; thus it was held that a gift was divested under a condition, though the person to whom it was given was not informed of the condition in time to comply with it (f).

By statute.

The Legislature invested courts of common law with power to relieve against forfeitures in the case of mortgages by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 219, which reproduced an earlier enactment, in the case of forfeiture for non-payment of rent by the Common Law Procedure Act, 1852, s. 212, and the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1, and in the case of forfeiture for non-insurance by sect. 2 (now repealed) of the last statute. By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, the jurisdiction of the Court of Chancery was vested in the Supreme Court thereby constituted. The Supreme Court is now invested with a large discretionary power to relieve against forfeiture by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, which is expressed in the most general terms, and applies not only to a condition properly so called, but also to a lease

(c) *Goodright v. Davids*, Cowp. 803.  
See *Roe v. Harrison*, 2 T. R. 425.

(d) *Peachy v. Somerset (Duke)*, 1 Stra. 447 ; 2 Wh. & T. L. C. 250 ; *Stoman v. Walter*, 1 Bro. C. C. 418 ; 2 Wh. & T. L. C. 257 ; *Taylor v. Popham*, 1 Bro. C. C. 167 ; *Hollinrake v. Lister*,

1 Russ. 500.

(e) *Peachy v. Somerset (Duke)*, 1 Stra. 447 ; 2 Wh. & T. L. C. 250, and notes.

(f) *Re Lewis*, [1904] 2 Ch. 656 ; 73 L. J. C. 748 ; *Hawkes v. Baldwin*, 9 Sim. 355 ; 7 L. J. C. 297.

limited to continue as long as the lessee abstains from committing a breach of covenant; but there is excepted from the operation of the section power to relieve against forfeiture for breach of a covenant assigning, underletting, parting with the possession, or disposing of the land leased, and for breach of certain covenants in mining leases, and also in the case of forfeiture for non-payment of rent, which is left to the earlier jurisdiction. The section also contained an exception in the power to grant relief in the case of bankruptcy, or where the term was taken in execution, but this was modified in favour of creditors by sect. 2 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). Sect. 14 of the Conveyancing and Law of Property Act, 1881, had been held inapplicable to underleases, but this was remedied by sect. 4 of the Act of 1892. For the purpose of granting relief under the Conveyancing Acts, 1881 and 1892, a lease or underlease of which specific performance would be granted is placed upon the same footing as an actual lease by sect. 5 of the last-mentioned statute (*g*).

## SECTION VII. EQUITABLE ESTATES AND INTERESTS IN LAND.

§ 1.—Equitable estates corresponding to legal estates.

§ 2.—Trusts for conversion.

§ 3.—Charges of money upon land.

§ 4.—Mortgages.

§ 5.—Equitable estates and interests arising out of contracts of sale.

### § 1. EQUITABLE ESTATES CORRESPONDING TO LEGAL ESTATES.

Equitable estates corresponding to legal estates—created by express limitation—by construction of equity.

Executory trusts—exceptional construction of the limitations—examples in marriage articles—in wills.

Equitable rights to property arising from fraud, mistake, etc., distinguished from equitable estates.

Equitable estates and interests either correspond with legal estates or are of kinds peculiar to equity, having no analogy in law. The former are treated in the first sub-section of this section; the latter form the matter of the following sub-sections.

Equitable estates which correspond with legal estates comprise estates in fee simple and fee tail, estates for terms of life and for terms of years, in strict analogy to the legal estates already

Equitable estates corresponding to legal estates.

(*g*) See *Charrington v. Camp*, [1902] 1 Ch. 386; 71 L. J. C. 196.

described. They are created either by express limitation or by construction of equity,—either by declared or by constructive trust (*a*).

Arising by  
express  
limitation.

In the express limitation of equitable estates corresponding with legal estates, as regards the quantity of estate, equity, in general, follows the law; if the same terms of limitation are used, although their use is not obligatory in all cases, they receive the same construction as if contained in an instrument limiting estates at law (*b*).

Arising by  
construction  
of equity.

But the rules of limitation apply only to express declarations of trust, and have no application to those equitable estates, which, though corresponding with legal estates, arise by construction of equity. Such are the constructive trusts or equitable estates and interests based upon the payment of the consideration of a purchase,—or which arise from a mere contract to purchase,—or resulting trusts which arise upon a legal conveyance not disposing of the whole equitable interest, or failing in effect to dispose of it (*c*). Trusts and equitable estates thus arising are, for the most part, measured and limited by the legal estates and interests on which they are imposed. Thus, the equitable estate attributed to the payment of a consideration is co-extensive with the legal estate to which it is referred;—so a resulting trust includes the whole undisposed of estate to which it applies;—so by a contract of sale which equity would specifically enforce the purchaser may acquire an equitable estate in fee or other the whole interest which the vendor contracts to sell without any technical limitation (*d*).

Executory  
trusts.

Executory trusts are special or active trusts directing the trustee to settle or dispose of the land for the estates and interests required by the trust; they are so called because they have to be executed by a deed conveying the land for the estates and limitations intended, as distinguished from trusts directing the trustee to hold the property upon trusts then executed, in the sense of being then perfectly limited and defined. Executory trusts are fulfilled and discharged by the execution of a deed in conformity with the directions of the trust (*e*).

(*a*) See *ante*, pp. 101, 107.

(*b*) *Ante*, pp. 107, 120.

(*c*) See *ante*, pp. 102, 103, 104.

(*d*) See *Shelley's Case*, 1 Co. 100 *b*; Tud. L. C. Conv. 332; *Bower v. Cooper*, 408; 11 L. J. C. 287; *ante*, pp. 102, 103, 104.

(*e*) *Gilcnorchy (Lord) v. Bosville*, Cas. t. Talb. 3; 2 Wh. & T. L. C. 763, and notes;

*Sackville-West v. Holmesdale (Visc.)*, L. R. 4 H. L. 543; 39 L. J. C. 505. See *per* Eldon, L. C., as to the inaccuracy of the expressions, *executory* and *executed* trusts, in *Jerroise v. Northumberland (Duke)*, 1 J. & W. 570. The word "directory" has been suggested instead of "executory." See 2 Spence, Eq. Jur. 131.

Executory trusts are here distinguished, as regards the limitation of estates, by admitting of an exceptional construction of the limitations expressed. They are often expressed in compendious terms by way of instructions for the limitations directed to be made, without setting out the limitations at length, as by directing or agreeing that property shall be settled "in strict settlement," "entailed," settled "with usual or proper powers," or the like; in which cases the construction consists in developing the limitations involved in such expressions in the form best suited to carry out the general intention of the trust (*f*).

Construction of the limitations in executory trusts.

And even where an executory trust is expressed in technical terms of limitation, effect will be given to the general object required to be carried out. Accordingly the court refuses to apply the rule in *Shelley's* case to the limitations of an executory settlement, expressing that the estate is to be settled on the parent for life with remainder to the issue or heirs of the body, if it appear to be an object of the settlement to secure a provision to the issue; for the application of the rule would enable the parent to defeat that object (*g*).

Technical terms of limitation.

Instances of executory trusts occur in marriage articles, agreeing that a settlement shall be made upon an intended marriage (*h*). A covenant in marriage articles by the intended husband "to settle an estate upon his issue" of the marriage, was construed to require successive estates tail to the children of the marriage after a life estate in the husband, but not to admit of portions for younger children (*i*).

Executory trusts in marriage articles.

Instances of executory trusts occur also in wills leaving property to trustees with directions for future settlement; but in this case the parties claim as volunteers, and in contradistinction to marriage articles, full effect will be given to the rule in *Shelley's* case unless it appear from other parts of the will that descendants are to take as purchasers (*k*).

Executory trusts in wills.

It seems necessary here to notice, for the purpose of distinguishing them, those equitable rights to the recovery of property

Equitable rights to property arising from fraud, etc.

(*f*) *Graves v. Hicks*, 11 Sim. 536; 10 L. J. C. 185; *Rockfort v. Fitzmaurice*, 2 Dr. & War. 1; *Stanley v. Colthurst*, L. R. 10 Eq. 259; 39 L. J. C. 650; and see notes to *Glenorchy (Lord) v. Bosville*, 2 Wh. & T. L. C. 763.

(*g*) *Treor v. Trevor*, 1 P. Wms. 622; 5 Bro. P. C. 122; *Streatfield v. Streatfield*, Cas. t. Talb. 176; 1 Wh. & T. L. C. 416; *Stonor v. Curwen*, 5 Sim. 264; *Grier v. Grier*, L. R. 5 H. L. 688.

(*h*) See notes to *Glenorchy (Lord) v. Bosville*, 2 Wh. & T. L. C. 763; 2 Spence, Eq. Jur. 130.

(*i*) *Grier v. Grier*, L. R. 5 H. L. 688.

(*k*) *Sweetapple v. Bindon*, 2 Vern. 536; *Samuel v. Samuel*, 14 L. J. C. 222; *Magrath v. Morehead*, L. R. 12 Eq. 491; 41 L. J. C. 120. See *Sackville-West v. Holmesdale (Visc)*, L. R. 4 H. L. 543; 39 L. J. C. 505.

which are not founded in any trust, strictly so called, either express or constructive. Such rights arise where the legal estate is acquired or retained under circumstances against conscience and equity, which a court of equity will redress;—as the right to cancel a conveyance obtained by fraud and have a re-conveyance,—the right to correct mistakes, and the like.

Distinguished  
from equitable  
estates.

“The jurisdiction of the Court of Chancery in regard to specific property, ranges itself under two great heads or divisions;—in the cases which range themselves under the first division, the court recognises and preserves a legal estate or title, as well as an equitable title; indeed, in most cases, the legal estate or interest has been devised or conveyed to the person in whom it is vested expressly for the purposes of the trust, and the legal title is only so far interfered with as to make it subservient to the enjoyment of the co-existent equitable interests,—the cases which range themselves under the second division, are those in which the legal title has not been conveyed to the party in whom it is vested by way of trust, but has been acquired, or is retained against conscience and equity; and the equitable doctrines which govern this branch of the jurisdiction are put in force for the purpose of having the legal title to the property transferred to the person who, according to honesty and conscience, in the view of the Court of Chancery, is entitled to the property. There is no object to be attained, as in the cases which come under the first division, which requires that the legal estate shall be kept outstanding: the claimant seeks to enforce an equitable *right*, not to secure an equitable *estate*: so that the doctrine of constructive trusts is applied in these cases only for the purpose of effecting an immediate transfer of the beneficial interest to the person who is entitled in equity to the legal interest” (*l*).

The remedial  
jurisdiction  
of equity.

The rights here referred to form an important branch of the *remedial* jurisdiction of equity, giving specific redress in cases of fraud, mistake, and the like, upon equitable principles; but they do not enter into the scope of the present work, which is restricted to the substantive law, and does not refer to the occasions and remedies of infringements, or wrongs, further than may be sometimes necessary or useful to do so for the purpose of explanation (*m*).

(*l*) 2 Spence, Equitable Jur. 1, 2.

(*m*) See *ante*, p. 104.



§ 2. TRUSTS FOR CONVERSION.

Trusts for conversion—of money into land—of land into money.

Absolute conversion—conditional conversion—discretion of trustees.

Resulting interest under a conversion by deed is personal estate—where the whole interest results there is no conversion.

Proceeds of conversion by will, undisposed of, results to the heir—when included in residuary bequest—in residuary devise—heir takes the proceeds as personalty, unless conversion unnecessary.

Election against conversion—election by owner of share—by tenant in tail—what constitutes election.

Conversion of real estate of partnership.

In this and the following sub-sections are treated those equitable estates and interests in land which are peculiar to equity, not only in respect of the mode of creating them, but also in respect of the kind and quality of the interest, and which have no correspondence with legal estates (*a*).

Estates and interests peculiar to equity.

“Money directed to be employed in the purchase of land, and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land” (*b*). Trusts for conversion of money into land belong to the law of personal property, and are therefore noticed only so far as applicable to chattels real.

Trusts for conversion of money into land, or of land into money.

The conversion takes effect according to the terms prescribed in the trust. If the trust is in terms absolute the conversion takes effect from the execution of the deed declaring the trust (*c*),—or, if created by will, from the death of the testator (*d*).

Absolute conversion.

If the trust is discretionary, or to be executed at a future date, or with the consent of certain parties, or upon certain other

Conditional conversion.

(*a*) See *ante*, p. 181.

(*b*) *Fletcher v. Ashburner*, 1 Bro. C. C. 497; 1 Wh. & T. L. C. 327.

(*c*) *Bayden v. Watson*, 12 L. J. C. 277; *Griffith v. Rickett*, 7 Hare, 299; *Clarke v. Franklin*, 4 K. & J. 257; 27

L. J. C. 567.

(*d*) *Beaucher v. Mead*, 2 Atk. 167; *Ward v. Arch*, 15 Sim. 389; *Robinson v. Robinson*, 19 Beav. 494. See *Spencer v. Wilson*, L. R. 16 Eq. 501; 42 L. J. C. 754.

events and conditions, there is no conversion until and except so far as the discretion is properly exercised, or the time has elapsed, or the required consents have been given, or other conditions satisfied; and the beneficiaries until the conversion take the property in its actual state (*e*).

Conversion at discretion of trustees.

The conversion may be absolute and immediate, as to the disposition of the property, but with a discretion in the trustees as to the time of selling (*f*). The court will not control a discretion given to trustees for the purpose of conversion (*g*).

Resulting interest under a conversion by deed.

Where a deed conveys land upon an absolute trust for conversion, for purposes which do not extend to the whole proceeds, or which partially fail of effect, the undisposed of interest in the proceeds results to the grantor according to the general doctrine of resulting trusts (*h*). But the deed operates as a conversion from the time of execution, and the resulting interest in the grantor is affected with the converted quality of personal estate, and therefore in case of his death, though before the execution of the trusts, it passes to his executor as personal estate and not to his heir (*i*). And in such case it is immaterial that the deed be made revocable, if it has not in fact been revoked (*k*).

Where whole interest results, no conversion.

If however the whole purpose of the conversion were to fail altogether, the direction for conversion would be taken to fail with it; the trust would not attach, and the property would result to the grantor in its original quality of real estate (*l*).

Undisposed of proceeds of conversion by will, passes to heir.

Different considerations arise under a will as to the destination of the undisposed of proceeds of a trust for conversion. The will does not operate until the death of the testator, and whatever is deemed real estate at the time of his death *primâ facie* belongs to his heir. A trust for conversion may alter the character of the property which he takes as heir, but unless it be given away to some other person his title as heir will prevail. The conversion is presumed to be for the purposes of the will only and no further,

(*e*) *Townley v. Bedwell*, 14 Ves. 591; *Walter v. Maunde*, 19 Ves. 424; *Bourne v. Bourne*, 2 Hare, 35; 11 L. J. C. 416; *Polley v. Seymour*, 2 Y. & C. Ex. 708. See *Att.-Gen. v. Dodd*, [1894] 2 Q. B. 150; 63 L. J. C. 319. As to conversion at option of a purchaser, see *post*, p. 223.

(*f*) *Robinson v. Robinson*, 19 Beav. 494; *Miller v. Miller*, L. R. 13 Eq. 263; *Re Raw*, 26 Ch. D. 601; 53 L. J. C. 1051.

(*g*) *Re Norrington*, 13 Ch. D. 654.

(*h*) See *ante*, p. 104.

(*i*) *Hawitt v. Wright*, 1 Bro. C. C. 86; *Griffith v. Ricketts*, 7 Hare, 299; 19 L. J. C. 100; *Clarke v. Franklin*, 4 K. & J. 257; 27 L. J. C. 567.

(*k*) *Griffith v. Ricketts*, 7 Hare, 299; 19 L. J. C. 100.

(*l*) See *Ripley v. Waterworth*, 7 Ves. 435; *Clarke v. Franklin*, 4 K. & J. 257; 27 L. J. C. 567.

and implies no gift or preference of the next of kin; "the heir is excluded, not by the direction to convert, but by the disposition of the converted property, and so far only as that disposition extends" (m).

Accordingly, where a testator devised real estate upon trust for conversion, with the further direction that the proceeds of the real estate should be "part of the personal estate," it was held that the heir was entitled to the surplus proceeds after satisfying all the purposes of the will (n).—And an expressed intention that realty shall be treated as converted into personalty for all purposes will not exclude the heir, unless it be accompanied by a gift (expressed or implied) to some one else (o).

Conversion is for the purpose of the will only.

The conversion being presumptively for the purposes expressed in the will only, the undisposed of proceeds of a trust for conversion will not, in general, pass under a general or residuary bequest of the personal estate. But if the trust for conversion be accompanied with a direction that the proceeds shall be considered as "part of the personal estate," or any equivalent direction blending the funds, it will then be included in a residuary bequest (p). Accordingly, where the testator, after giving all his real and personal estate to trustees to convert into money for the purpose of paying certain legacies, etc., directed his trustees to hold "the residue of his said personal estate so converted into money" upon trust for certain persons, it was held that the residuary clause included all the proceeds of the real estate and gave it away from the heir (q).

Proceeds of conversion do not pass under residuary bequest.

Unless expressly included in the personalty.

A general or residuary devise will now include the money arising from the execution of a trust for conversion if the gift fails by reason of lapse, or by reason of the gift being contrary to law, or otherwise incapable of taking effect (r).

Proceeds of conversion pass under residuary devise.

If a sale is obligatory or necessary for the purposes of the trust, this interest in the land or the proceeds comes to the heir, or the residuary devisee, in its converted quality of personal estate and is transmissible accordingly; but, if a sale is not

Heir or residuary devisee takes the land or proceeds as personalty.

(m) *Ackroyd v. Smithson*, 1 Bro. C. C. 503; 1 Wh. & T. L. C. 372. Conversely, if personal estate be bequeathed upon trust for conversion into land, any interest undisposed of, or disposed of in a manner which fails, results to the next of kin of the testator and not to his heir. *Simmons v. Pitt*, L. R. 8 Ch. 978; 43 L. J. C. 267.

(n) *Gordon v. Atkinson*, 1 De G. & S. 478; *Flint v. Warren*, 16 Simons, 124; *Taylor v. Taylor*, 3 De G. M. & G. 190; 22 L. J. C. 742.

(o) *Fitch v. Weber*, 6 Hare, 145; *Robinson v. London Hospital*, 10 Hare, 19; 22 L. J. C. 754.

(p) 1 Jarman on Wills, 562, 566; *Byam v. Manton*, 1 Russ. & M. 503; *Singleton v. Tomlinson*, 3 App. Cas. 404.

(q) *Spencer v. Wilson*, L. R. 16 Eq. 501; 42 L. J. C. 754.

(r) Wills Act, 1837 (1 Vict. c. 26), s. 25; *Carter v. Haswell*, 26 L. J. C. 576. As to the former law, see Hawkins, Wills, 44; *Smith v. Lomas*, 33 L. J. Ch. 578.

obligatory or necessary, he takes it as real estate descendible to his heirs. The quality of the property is thus fixed, whether the failure of the purposes is total or partial, and an actual sale, if unnecessarily made, will not alter the quality of the property for the purpose of transmission (*s*).

Election  
against con-  
version.

The person becoming absolutely entitled to the beneficial interest in property directed to be converted may interpose to prevent the actual conversion and elect to take the property in its existing state. And if there are several persons interested, and all concur, they may effect a reconversion by election (*t*).

Election by  
owner of  
share of pro-  
ceeds.

A person entitled to a share only in the proceeds of the sale of land under a trust for conversion cannot alone, and without the consent of the persons entitled to the other shares, elect to take his share as real estate, or prevent the sale either as to a specific part of the land or as to an undivided share; for by so doing he would affect the sale of the other part or shares (*u*). But a person entitled to a share in money directed to be laid out in land, may, in general, elect to take his share in money leaving the trust to operate upon the balance only (*x*).

Election by  
tenant in tail.

A tenant in tail under a trust for conversion of money into land may acquire the absolute interest by means of a disentailing assurance, and elect to take the money (*y*). Purchase money representing land acquired under the compulsory powers contained in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), is by force of the same statute required to be reinvested in land, and is considered as impressed with the quality of the land; but the money will not be paid out to a tenant in tail unless he executes a disentailing deed (*z*).

What consti-  
tutes election.

The election against conversion may be made by express declaration of the intention to take the property in its existing state, or by acts from which the court would presume such intention. Taking possession, where the legal estate is outstanding in trustees, and taking the rents and profits, are in themselves

(*s*) *Smith v. Claxton*, 4 Madd. 484; *Jessopp v. Watson*, 1 My. & K. 665; *Re Richerson*, [1892] 1 Ch. 379; 61 L. J. C. 202. As to a sale by order of court, see *Steed v. Preece*, L. R. 18 Eq. 192; 43 L. J. C. 687; *Burgess v. Booth*, [1908] 2 Ch. 648; 77 L. J. C. 32. See also *Re Smith*, L. R. 10 Ch. 79. As to conversion for fiscal purposes, see *Att.-Gen. v. Dodd*, [1894] 2 Q. B. 150; 63 L. J. Q. B. 319; *Re Spencer Cooper*, [1908] 1 Ch. 130; 77 L. J. C. 64.

(*t*) *Benson v. Benson*, 1 P. Wms. 130; *Wheldale v. Partridge*, 8 Ves. 227; *Mutlow v. Bigg*, 1 Ch. D. 385; 45

L. J. C. 282.

(*u*) *Holloway v. Radcliffe*, 23 Beav. 163; 26 L. J. C. 401; *Vincent v. Fine*, 1 W. R. 264; *Re Heathcote*, 58 L. T. 43; affd. 85 L. T. Jol. 120.

(*x*) *Seeley v. Jago*, 1 P. Wms. 389; *Walker v. Denu*, 2 Ves. Jun. 170.

(*y*) Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), s. 71; *Re Harvey*, [1901] 2 Ch. 290; 60 L. J. C. 694. And see *Pearson v. Lane*, 17 Ves. 101.

(*z*) *Re Butler's Will*, L. R. 16 Eq. 479. See *Re Reynolds*, 3 Ch. D. 61. As to a sale by order of court, see *n. (s)*, *supra*.

sufficient, if continued for a period of years, to effect a reconversion (*a*). The presumption of an election to take the property in its unconverted state will be strengthened if coupled with other acts, such as obtaining possession of the title-deeds (*b*), paying off debts and legacies charged on the land (*c*), or exercising rights of ownership, such as creating new tenancies (*d*). It is also to be observed in this connection that questions sometimes arise on the construction of wills whether a testator intended money to pass by a gift of land, or land by a gift of money, but these cases depend entirely upon the expressed intention of the testator (*e*).

A common application of the doctrine of conversion occurs with land becoming part of a partnership property. The contract of partnership imports presumptively an agreement that, upon a dissolution, all the assets of the partnership shall be sold for the purpose of liquidating the partnership debts, and of dividing the balance (if any) between the partners in their respective shares. Hence land which is partnership property is considered, as regards the interests of the partners, to be personal estate; and upon the death of a partner the beneficial interest in his share will pass as personal property. But the expressed intention of the parties will displace this presumption, and in that event the share or estate of the deceased partner will be transmissible as land (*f*).

Conversion of  
real estate of  
partnership.

(*a*) *Kirkman v. Miles*, 13 Ves. 338; *Re Gordon*, 6 Ch. D. 531; 46 L. J. C. 794; *Glorer v. Heelis*, 32 L. T. 534; 23 W. R. 677.

(*b*) *Davies v. Ashford*, 15 Sim. 42; 14 L. J. C. 473.

(*c*) *Griesbach v. Freemantle*, 17 Beav. 314; *Mutlow v. Bigg*, 1 Ch. D. 385; 45 L. J. C. 282.

(*d*) *Mutlow v. Bigg*, 1 Ch. D. 385; 45 L. J. C. 282.

(*e*) See *Re Stewart*, 1 Sm. & G. 32;

*Re Harman*, [1894] 3 Ch. 607; 63 L. J. C. 822; *Gillies v. Longlands*, 4 De G. & Sm. 372; 20 L. J. C. 441; *Re Grimthorpe (Lord)*, [1908] 2 Ch. 675; 78 L. J. C. 20.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 22; *Phillips v. Phillips*, 1 M. & K. 649; *Steward v. Blakeway*, L. R. 4 Ch. 603; *Att.-Gen. v. Hubbuck*, 13 Q. B. D. 275. See *Daris v. Daris*, [1894] 1 Ch. 393; *Re Wilson*, [1893] 2 Ch. 340; 62 L. J. C. 781.

## § 3. CHARGES OF MONEY UPON LAND.

Charges of money for portions—debts—legacies—mortgages.  
 Charge of debts by deed—trust for debtor—for creditors.  
 Liability of land to debts of deceased—charge of debts by will.  
 Charge of debts creates equitable assets—priority at law corrected in equity.  
 Primary liability of personal estate to pay debts—mixed fund—application of realty—rights of creditors not affected.  
 Charge of legacies on real estate—in aid of personal estate—on real and personal estate rateably—on real estate exclusively—as against devisees—charge of legacies implied from residuary gift.  
 Interest upon charges—of debts—of legacies.  
 Power to raise charges—statutory power in devisee or executor.  
 Power to raise charge by sale or mortgage—by “rents and profits”—charges of annuities.  
 Power to discharge by receipts—express—implied—power in executors.  
 Discharge of, by Court.

Charges of money upon land.

Under the general doctrine of conversion, land may be impressed with a trust for raising a certain sum of money, or a sum required for certain specified purposes. Such a charge operates as a conversion and alienation *pro tanto*; but it does not interfere with the limitation and disposal of the land, as real estate, subject to the charge.

For portions.

Charges of this kind are used in settlements of land to provide portions for persons (generally younger children) who will not come into the actual enjoyment of the settled land. The ordinary mode of making the charge for this purpose is by vesting a long term of years in trustees upon trust to raise the intended portions or charges, when required, by sale or mortgage, or by receipt of the rents and profits (*a*). The law of portions relates chiefly to the times of vesting and payment, that is, to the limitation of portions as future interests, and therefore belongs more appropriately to the next chapter on “The Limitation of Future Estates” (*b*).

For debts and legacies.

Charges of money upon land are also used for the payment of debts; and they may be created for this purpose by deed or by will;—they are also of common use in wills for the payment of legacies. Mortgages also are a special form of charge in common use for securing debts upon land.—These forms of charges will here be considered (*c*).

Mortgages.

(*a*) 2 Hayes, Conv. 61; 2 Prideaux, Conv. 281; 2 Spence, Eq. Jur. 390. See *ante*, p. 166.

(*b*) See *post*, p. 343, where see also

as to the doctrine of satisfaction of portions by advancement before the time of payment.

(*c*) See § 4, “Mortgages,” *post*, p. 202.

A deed conveying land to a trustee for the payment of the debts of the grantor, to which the creditors are not parties, does not alone raise a trust for the creditors. It creates an agency or trust on behalf of the grantor himself only, which is voluntary and revocable. But if communicated to the creditors and assented to by them, it may then create a valid trust in their favour (*d*). "A voluntary conveyance of property upon trust to pay creditors, not parties to the transaction, has been very reasonably held to create a trust for the author of the deed, and not for his creditors.—On the other hand, it is equally clear that a voluntary conveyance of property to trustees upon trust for a third party, may create an indefeasible trust in favour of that party. The difference in principle between the two classes of cases is marked and obvious; but to decide to which of the two classes a given trust deed belongs is often a task of difficulty; it depends upon the intention of the author of the deed, to be collected from the deed itself, and such surrounding circumstances as may be admissible in aid of the interpretation of the deed" (*e*).

Charge of debts—by deed of conveyance for benefit of creditors.

Land was first made generally liable to satisfy the debts of a deceased person by the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104), sometimes known as Sir John Romilly's Act (*f*). This statute imposed upon land of any tenure the liability to pay the just debts (*g*) of a deceased, as well debts due on simple contract, as by specialty in which the heir was not bound. The estates of deceased persons who were traders within the meaning of the bankruptcy laws had been subjected to a similar liability in 1807 by the statute 47 Geo. III. c. 74. The Administration of Estates Act, 1833, required the creditor to resort to proceedings in courts of equity to establish his right (*h*), and contained provisions (since repealed) respecting the priority of the creditors *inter se*. The effect of the Administration of Estates Act, 1833, is peculiar. Until administration proceedings are taken, and a judgment obtained, creditors have no title to the land, but after judgment the land is charged, and their right

Liability of land to debts of deceased.

(*d*) *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; *Garrard v. Lauderdale* (Lord), 3 Sim. 1; 2 Russ. & M. 451; *Acton v. Woodgate*, 2 M. & K. 495; *Harland v. Binks*, 15 Q. B. 713; *Johns v. James*, 8 Ch. D. 744.

(*e*) *Per Wigram, V.-C., Griffith v. Ricketts*, 7 Hare, 299, 308; *Godfrey v. Poole*, 13 App. Cas. 497; *New Prince and*

*Garrard's (Trustee) v. Hunting*, [1897] 2 Q. B. 19; 66 L. J. C. 554. Affd. *nom.* *Sharp v. Jackson*, [1899] A. C. 419; 68 L. J. Q. B. 866.

(*f*) Carson, Real Prop. Stats. p. 398.  
(*g*) *Dring v. Greetham*, 23 L. J. C. 156.

(*h*) *Ball v. Harris*, 4 My. & Cr. 264, 268; 8 L. J. C. 114.

relates back to the death of the testator (*k*). Creditors by bond or other specialty in which the heirs were bound, as where a man covenanted on behalf of himself and his heirs, could enforce their debts against the heir to the extent of lands descended upon him, but not against a devisee. This state of things was remedied by a series of statutes, commencing with 3 & 4 Will. & M. c. 14 and ending with the Debts Recovery Act, 1830, enabling these creditors to recover from the devisee to the value of the lands devised (*l*). An effective provision for the payment of debts, including portions for children raisable under the provisions of an antenuptial contract, is excepted from the purview of the Acts (*m*). Now by Part I. of the Transfer of Land Act, 1897 (60 & 61 Vict. c. 65), real estate vested in any person without a right in any other person to take by survivorship, notwithstanding any testamentary disposition to the contrary, devolves upon his personal representatives, impressed with a general liability to discharge the debts of the deceased, according to existing rules of priority of application of assets (*n*).

Charge of  
debts by will.

Real estate might, however, be made available for the payment of debts by the act of a testator, by means of an express devise in trust for the payment of debts or a charge of debts (*o*). "Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, or only a life interest, or no beneficial interest at all" (*p*). But if it appears upon the construction of the will that it was not the testator's intention to charge his realty with payment of his debts, effect will be given to that intention (*q*). A general direction that debts shall be paid is sufficient to raise a charge of debts by implication, unless there be words restricting the charge to a particular fund or estate (*r*).

(*k*) *Erans v. Brown*, 5 Beav. 114; 11 L. J. C. 349; *Re Hyatt*, 38 Ch. D. 609; 57 L. J. C. 777; *Re Moon*, [1907] 2 Ch. 304; 76 L. J. C. 535.

(*l*) See *Re Atkinson*, [1908] 2 Ch. 307; 77 L. J. C. 768; and notes to *Jefferson v. Morton*, 2 Wms. Saund. pp. 16 *et seq.*

(*m*) See *Bailey v. Elkins*, 7 Ves. 319, 323.

(*n*) *Re Kempster*, [1906] 1 Ch. 566; 75 L. J. C. 286. See Carson, Real Prop. Stats. pp. 417 *et seq.*

(*o*) See *King v. Devison*, 1 Ves. & B. 272; *Burke v. Jones*, 2 Ves. & B. 275.

(*p*) Jessel, M. R., *Re Tanqueray-*

*Willoume and Landau*, 20 Ch. D. 463, 476; 51 L. J. C. 434; *Re De Burgh Lawson*, 41 Ch. D. 568; 58 L. J. C. 561; *Re Brooke*, [1894] 1 Ch. 43; 63 L. J. C. 159.

(*q*) *Warren v. Davies*, 2 My. & K. 49; *Re Bailey*, 12 Ch. D. 268; *Re Head's Trustees and Macdonald*, 45 Ch. D. 310; 59 L. J. C. 604.

(*r*) *Clifford v. Lewis*, 6 Madd. 33; *Palmer v. Grares*, 1 Keen, 545; *Harding v. Grady*, 1 Dr. & War. 430; *Wisden v. Wisden*, 2 Sm. & G. 396; *Wrigley v. Sykes*, 21 Beav. 337; 25 L. J. C. 458.



A devise of land for payment of debts, or a general charge of debts by will renders the land affected equitable assets (s). The distinction between legal and equitable assets depends upon the nature of the remedy of the creditor against the estate, not upon the nature of the remedy of the executor on behalf of the estate. Thus, whatever property the personal representative can recover *virtute officii*, though by means of a suit in equity only, is included in the legal assets; which the creditor can charge against him by proceeding in a court of law. And whatever cannot be reached through the executor, but is available to the creditor by means of proceedings in equity only, constitutes *equitable assets* (t). Accordingly, as the right of the creditor against the land given by the Administration of Estates Act, 1833, could only be enforced in a court of equity, the land was thereby made equitable assets (u). On the other hand, it would seem that land by force of Part I. of the Transfer of Land Act, 1897, must now be regarded as legal assets.

Charge of debts creates equitable assets.

In the administration of legal assets a creditor may in some cases obtain a preference; thus, the executor may pay one creditor before another of equal degree; also the executor may retain for his own debt. These rights he did not possess in a court of equity, for the maxim there was, "Equality is equity." And, in case of a deficiency of assets, the creditor who has been preferred out of legal assets is not allowed any claim against equitable assets until the other creditors have been brought to equality with him by payment of their debts to a proportionate amount (x).

Priority at law corrected in equity.

Effect will be given to the expressed intention of a testator that land, or its proceeds, shall be applied in exoneration of his personal estate (y). But unless it is clear that the testator intended not only to charge the real estate, but to discharge the personal estate, the personal estate remains the primary fund applicable to the discharge of the testator's debts (z).

Primary liability of personal estate to pay debts.

(s) *Silk v. Prime*, 1 Bro. C. C. 138, n.; *Bailey v. Ekins*, 7 Ves. 319; *Bain v. Sadler*, L. R. 12 Eq. 570; 40 L. J. C. 791.

(t) *Cook v. Gregson*, 3 Drew. 547; 25 L. J. C. 706; *Att.-Gen. v. Brunning*, 8 H. L. C. 243; 30 L. J. C. 379.

(u) *Re Illidge*, 24 Ch. D. 654; 53 L. J. C. 991; *Walters v. Walters*, 18 Ch. D. 182; 50 L. J. C. 819.

(x) *Vane (Earl) v. Rigden*, L. R. 5 Ch. 663; 39 L. J. C. 707; *Bain v. Sadler*, L. R. 12 Eq. 570; 40 L. J. C. 491; *Walters v. Walters*, 18 Ch. D. 182; 50 L. J. C. 819; *Re Illidge*, 24

Ch. D. 654; 53 L. J. C. 991. On the principle of marshalling the assets, see *post*, Chap. II. Sect. VI.

(y) *Bootle v. Blundell*, 1 Mer. 193; *Blount v. Hipkins*, 7 Sim. 43; 4 L. J. C. 13; *Lance v. Aglionby*, 27 Beav. 65; *Forrest v. Prescott*, L. R. 10 Eq. 545. See *Kilford v. Blaney*, 31 Ch. D. 56; 55 L. J. C. 185.

(z) *Ancaster (Duke) v. Mayer*, 1 Bro. C. C. 454; 1 Wh. & T. L. C. 1; *Re Banks*, [1905] 1 Ch. 547; 74 L. J. C. 336. See *Re De Burgh Lawson*, 41 Ch. D. 568; 58 L. J. C. 561; *Re Hartley*, [1900] 1 Ch. 152; 69 L. J. C. 79.

**Mixed fund.** A direction, either absolute or discretionary, to convert real estate for the purpose of providing with the personalty a mixed fund for the discharge of debts and liabilities, charges the real and personal estates rateably in proportion to their relative values; but unless there be a direction to convert the realty, the primary liability of the personalty remains (*a*).

**Application of realty.** Where the land is applicable to the payment of debts, it is applied in the following order: (1) real estate devised or ordered to be sold for the payment of debts, but not lands which are simply charged with the payment of debts (*b*); (2) real estate descended (*c*); (3) real estate specifically devised or passing under a residuary bequest, the latter still being a specific gift notwithstanding the Wills Act, 1833 (*d*). A lapsed devise descending to the heir bears only the same charge of debts as it would have borne had the devisee survived (*e*).

**Rights of creditors not affected.** It is to be observed that creditors were not affected by the rule of administration concerning the application of assets, and might pursue their remedies against any of the assets at their election (*f*), unless they had forfeited their rights by laches (*g*). Having regard to the recent times in which the question has been raised, it may not be out of place to point out that the rule affects the right of the creditor against the property, and not his personal right against the executor (*h*). And the court by marshalling the assets would re-adjust the rights *inter se* of the representatives of the testator, if affected by the election of the creditor (*i*).

**Charge of legacies on real estate.** If a pecuniary legacy is given generally, the ordinary rule and presumption is that the personal estate is the exclusive fund for the payment; and if the personal estate proves deficient, that alone is no ground for charging the deficiency either wholly or rateably upon the real estate.—Only if the personal estate is exhausted by debts, the pecuniary legatee may stand in the

(*a*) *Roberts v. Walker*, 1 Russ. & M. 752; *Boughton v. Boughton*, 1 H. L. C. 406; *Tench v. Cheese*, 6 De G. M. & G. 453; 24 L. J. C. 716; *Allan v. Gott*, L. R. 7 Ch. 439; 41 L. J. C. 571. See *Re Stephens*, 43 Ch. D. 39; 59 L. J. C. 109.

(*b*) *Milnes v. Slater*, 8 Ves. 295; *Phillips v. Parry*, 22 Beav. 279.

(*c*) *Manning v. Spooner*, 3 Ves. 114; *Milnes v. Slater*, 8 Ves. 295. See *Stead v. Hardaker*, L. R. 15 Eq. 175; 42 L. J. C. 317.

(*d*) *Manning v. Spooner*, 3 Ves. 114; *Lancefield v. Iggulden*, L. R. 10 Ch.

136; *Hensman v. Fryer*, L. R. 3 Ch. 420; 37 L. J. C. 97.

(*e*) *Fisher v. Fisher*, 2 Keen, 610; 7 L. J. C. 176; *Ryces v. Ryces*, L. R. 11 Eq. 539; 40 L. J. C. 252.

(*f*) *Manning v. Spooner*, 3 Ves. 114; *Davies v. Nicholson*, 2 De G. & J. 693; 27 L. J. C. 719.

(*g*) *Ridgway v. Newstead*, 3 De G. F. & J. 566; 30 L. J. C. 889.

(*h*) See *Harrison v. Kirk*, [1904] A. C. 1; 73 L. J. C. 35.

(*i*) *Aldrich v. Cooper*, 8 Ves. 382; 2 Wh. & T. L. C. 36; *Re Kempster*, [1906] 1 Ch. 446; 75 L. J. C. 286.

place of the creditors, and to that extent charge the lands descended; but he has no such right as against lands specifically devised, nor against a residuary devisee (*k*).

If the real estate be also charged with the legacy, the presumption is that it is made secondarily liable, only in case the personal estate, which is the primary fund, should be insufficient (*l*). The right of the legatee against the real estate is ascertained as at the death of the testator, and the land is not charged with a deficiency subsequently arising by the default of the executor (*m*); unless the devisee of the real estate was also executor (*n*).

Charge of legacies on real estate in aid of personality.

The real and personal estate may be charged with the payment of pecuniary legacies rateably by a sufficient expression of intention to that effect in the will; as by the testator creating a mixed fund of the real and personal estate out of which the legacies are directed to be paid (*o*).

On real and personal estate rateably.

A pecuniary legacy may be charged upon real estate exclusively; for it has no existence but by the will and must come out of the fund the testator points out, unlike debts which have a separate and independent claim by operation of law (*p*). Thus the devise of an estate upon trust to pay a certain sum to a person, or to pay certain legacies, charges such legacies exclusively upon that estate (*q*). So, a direction that legacies shall be paid *out of* a certain estate, or out of the real estate generally, as distinguished from a charge of the legacies *upon* the real estate, creates an exclusive charge (*r*).

On real estate exclusively.

The nature of the legacy may also show the intention of charging it exclusively or primarily upon the real estate. As where a testator charged his real estate with sums for his children and directed that interest should be raised out of the real estate for their maintenance, it was held that the sums were intended to be raised only in the same manner (*s*). So a bequest of an annuity charged upon an estate with a power

(*k*) *Tower v. Rous* (Lord), 18 Ves. 132; *Mirehouse v. Scaife*, 2 M. & Cr. 695; *Erans v. Erans*, 17 Sim. 86; *Greville v. Browne*, 7 H. L. C. 689; *Farquharson v. Floyer*, 3 Ch. D. 109; *Re Boards*, [1895] 1 Ch. 499. See *Robertson v. Broadbent*, 8 App. Cas. 812. As to marshalling, see *post*, Chap. 11. Sect. VI.

(*l*) *Davies v. Ashford*, 15 Sim. 42; 11 L. J. C. 473; *Boughton v. Boughton*, 1 H. L. C. 406.

(*m*) *Richardson v. Morton*, L. R. 13 Eq. 123; 41 L. J. C. 8.

(*n*) *Howard v. Chaffers*, 2 Dr. & S.

236; 32 L. J. C. 686.

(*o*) *Allan v. Gott*, L. R. 7 Ch. 439; 41 L. J. C. 571. See *ante*, p. 194.

(*p*) *Heath v. Heath*, 2 P. Wms. 366; *Jones v. Bruce*, 11 Sim. 221; *Burrell v. Egremont* (Earl), 7 Beav. 205.

(*q*) *Spurway v. Glynn*, 9 Ves. 483; *Erans v. Evans*, 17 Sim. 86; *Kilford v. Blaney*, 31 Ch. D. 56; 55 L. J. C. 185.

(*r*) *Heath v. Heath*, 2 P. Wms. 366; *Amesbury v. Brown*, 1 Ves. sen. 482; *Davies v. Ashford*, 15 Sim. 42; 11 L. J. C. 473.

(*s*) *Jones v. Bruce*, 11 Sim. 221.

of distress, was held to charge the land primarily, if not exclusively (*t*).

As against devisees.

A general charge of pecuniary legacies on the real estate is presumed not to be intended to extend to land specifically devised (*u*). But where a charge is made of debts and legacies combined, the same general terms will charge both upon all the real estate, including estates specifically devised (*x*).

Charge of legacies implied from gift of residue.

Where legacies are given generally and followed by a gift of the *residue* of the real and personal estate, the legacies are taken to be charged upon the real and personal estate as one fund (*y*). The rule is applicable where there is also a specific devise of part of the testator's real estate, as well as a residuary gift of a mixed fund (*z*).

Interest upon charge.

An equitable charge upon land carries interest at the rate of 4 per cent., in the absence of any special trust or direction concerning interest (*a*):—as a deposit or instalment of purchase money paid under a contract of sale, after default in the vendor or rescission on account of fraud or mistake, for which therefore the purchaser acquires a lien upon the land (*b*), and a purchaser has been allowed interest at the rate of 4 per cent. only, although himself liable to pay interest at 5 per cent. had there been delay in completion (*c*);—an equitable mortgage by deposit of deeds to secure a debt not bearing interest (*d*);—costs ordered by the court to stand charged upon certain property (*e*). In commercial transactions, or where a special case can be made, the court will allow interest at the rate of 5 per cent. or even at a higher rate (*f*).

Interest upon debts.

A charge or trust for payment of debts presumptively includes the liability according to the original contract. If interest was originally payable it will continue to be so, but in the case of

(*t*) *Poole v. Heron*, 42 L. J. C. 348.

(*u*) *Spong v. Spong*, 3 Bli. N. S. 84; *Conron v. Conron*, 7 H. L. C. 168.

(*v*) *Maskell v. Farrington*, 3 De G. J. & S. 338. See *Mannoe v. Greener*, L. R. 14 Eq. 456.

(*y*) *Greville v. Browne*, 7 H. L. C. 689; *Peacock v. Peacock*, 34 L. J. C. 315; *Gainsford v. Dunn*, L. R. 17 Eq. 405; *Re Boards*, [1895] 1 Ch. 449. See *Re Grainger*, [1900] 2 Ch. 756; 69 L. J. C. 789; affd. nom. *Higgins v. Dawson*, [1902] A. C. 1; 71 L. J. C. 132.

(*z*) *Francis v. Clemow*, Kay, 435; 23 L. J. C. 288; *Wheeler v. Howell*, 3 K. & J. 198; *Bray v. Stevens*, 12 Ch. D. 162.

(*a*) *Re Drax*, [1903] 1 Ch. 781; 72 L. J. C. 505; *Re Dary*, [1908] 1 Ch. 61.

(*b*) *Rose v. Watson*, 10 H. L. C. 672; 33 L. J. C. 385; *Torrance v. Bolton*, L. R. 14 Eq. 124; affd. L. R. 8 Ch. 118; 42 L. J. C. 177; *Re Hargreaves and Thompson's Cont.*, 32 Ch. D. 454; *Re Marshall and Salt's Cont.*, [1900] 2 Ch. 202; 69 L. J. C. 542; *Whitbread & Co. v. Watt*, [1902] 1 Ch. 835; 71 L. J. C. 424.

(*c*) *Re Arnold*, 14 Ch. D. 270, 285.

(*d*) *Re Kerr's Policy*, L. R. 8 Eq. 331.

(*e*) *Lippard v. Ricketts*, L. R. 14 Eq. 291. See *Eardley v. Knight*, 41 Ch. D. 537; 58 L. J. C. 622.

(*f*) *Edwards v. Martin*, L. R. 1 Eq. 121; *Sargood's Claim*, L. R. 15 Eq. 43; *Ex p. Alison*, L. R. 15 Eq. 394; *Aylesford (Earl) v. Morris*, L. R. 8 Ch. 484; 42 L. J. C. 548; *Ex p. Furber*, 17 Ch. D. 191.

simple contract debts interest will only be payable if express provision be made for payment, and will be payable only from the time when the charge or trust becomes effective (*g*).

A pecuniary legacy given in general terms, without any time fixed for payment, if charged immediately upon land, carries interest from the death of the testator; but if charged by a trust for sale, or as charging the personal estate, it is not, in general, payable, and therefore does not carry interest, until a year after the death (*h*). A legacy payable at a fixed time carries interest from the time of payment only, unless expressly payable with interest, or unless a gift of interest is to be implied under the circumstances (*i*).

Interest upon legacies.

A legacy to an infant child of the testator, or to a child to whom a testator has placed himself *in loco parentis*, is held to carry interest from the death of the testator, even where the gift is future or contingent (*j*).—A specific legacy carries all the interest or dividends actually accruing upon it from the death of the testator (*k*).

Charges on land are regulated, as to the person to raise them and as to the mode of raising them, by the provisions of the instrument creating the charges; or, in the absence or failure of such provisions, they are left to the remedies given by the Court of Chancery. Formerly intricate questions frequently arose as to the proper person to raise the charge and as to the mode in which it should be raised. In the case of testators dying after the 31st December, 1897, there will be no difficulty as to parties, for the legal estate is vested in the personal representative, as well in the case of land as of personalty, by Part I. of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65). A general charge of debts upon real estate, not followed by a devise of the real estate to the executors, conferred upon them an equitable power of sale, and a good title could not be made without the

Power to raise charges.

(*g*) *Shirley v. Ferrers*, 1 Bro. C. C. 41; *Tuit v. Northwick (Lord)*, 4 Ves. 816; *Pearce v. Slocombe*, 3 Y. & C. Ex. 84; *Jenkins v. Perry*, 3 Y. & C. Ex. 178; *Bateman v. Margerison*, 16 Beav. 477. See *Askew v. Thompson*, 4 K. & J. 620.

(*h*) *Pearson v. Pearson*, 1 Sch. & L. 10; *Shirt v. Westby*, 16 Ves. 393; *Turner v. Buck*, L. R. 18 Eq. 301; 43 L. J. C. 583. See *Kirkpatrick v. Bedford*, 4 App. Cas. 96. As to rate of interest payable, see *Wood v. Penoyre*, 13 Ves. 325; *Lambert v. Lambert*, L. R. 16 Eq. 320; 43 L. J. C. 106.

(*i*) *Re Gardner*, 67 L. T. 552; *Re Moody*, [1895] 1 Ch. 101; *Re Crane*, [1908] 1 Ch. 379; 77 L. J. C. 212; *Milltown (Earl) v. Trench*, 4 Cl. & F. 276.

(*j*) *Hill v. Hill*, 3 Ves. & B. 183; *Leslie v. Leslie*, Ll. & G. temp. Sugd. 1; *Re Richards*, L. R. 8 Eq. 119; *Chidgey v. Whitby*, 41 L. J. C. 699; *Re Moody*, [1895] 1 Ch. 101; 64 L. J. C. 174. See *Re Crane*, [1908] 1 Ch. 379; 77 L. J. C. 212.

(*k*) *Dacies v. Fowler*, L. R. 16 Eq. 308; 43 L. J. C. 90.

concurrence of the heir or devisee (*l*) ; but if the personal representatives were also devisees of the real estate, even if they were trustees for other persons, they could convey the legal estate and give a good discharge for the purchase or mortgage money (*m*) ; and a good title was obtained from a devisee of lands specifically charged who was also one of two executors and alone received the purchase money (*n*). A power to sell or mortgage, without naming the donee, vested the land in the persons appointed to distribute the fund, and if these persons were the executors, the power continued in the personal representatives of the testator for the time being in the chain of representation (*o*).

Statutory  
power in  
devisee.

In the case of proceedings to administer the real estate of a testator under the Administration of Estates Act, 1833, the heir or devisee, according as the property had been allowed to descend or had been devised, was a necessary party (*p*). In the case of the wills of testators dying after 13th August, 1859—and the statute still remains in force in the case of copyholds (see Land Transfer Act, 1897, s. 1 (4))—where the testator has not made any express provision for the raising of any debt, legacy or sum of money out of the estate charged, the devisee or devisees in trust of the whole of the testator's estate and interest may, notwithstanding any trusts actually declared by the testator, raise the debts, legacy or money charged thereon by a sale and absolute disposition, or by a mortgage of the same. And these powers are exercisable by all persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, or by any persons appointed under the will or by the court to succeed to the trusteeship vested in such devisee in trust. If the devise does not convey the whole of the testator's estate and interest therein to the trustees, the power of raising the debts, legacy, or other moneys is vested in the person or persons (if any) in whom the executorship shall for the time being be vested (*q*).

Or in execu-  
tor.

A general charge upon land or a trust to raise money, not

(*l*) *Gosling v. Carter*, 1 Coll. 644 ; 14 L. J. C. 218 ; *Doe v. Hughes*, 6 Ex. 223 ; 20 L. J. Ex. 148.

(*m*) *Elliot v. Merryman*, Barnard. 78 ; 2 Wh. & T. L. C. 897 ; *Ball v. Harris*, 4 My. & Cr. 264 ; 8 L. J. C. 114 ; *Re Tanqueray-Willawme and Landau*, 20 Ch. D. 485 ; 51 L. J. C. 434.

(*n*) *Corser v. Cartwright*, L. R. 7 H. L. 731 ; 45 L. J. C. 605 (see also the report of the case below, L. R. 8 Ch. 971) ; *W. of Eng. and S. Wales Bk. v. Murch*, 23

Ch. D. 138 ; 52 L. J. C. 784.

(*o*) *Bentham v. Wiltshire*, 4 Madd. 44 ; *Patton v. Randall*, 1 J. & W. 189 ; *Forbes v. Peacock*, 11 M. & W. 630 ; 12 L. J. Ex. 460 ; 12 Sim. 528 ; *Allum v. Fryer*, 3 Q. B. 442. And see Sugd., Powers, 119 *et seq.*

(*p*) *Bridges v. Hinxman*, 16 Sim. 71. See *Re Hyatt*, 38 Ch. D. 609 ; 57 L. J. C. 777.

(*q*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 65), ss. 14, 15, 16.

prescribing any particular mode of raising it, in general, authorises a sale (*v*). And a power to sell implies a power to mortgage; but if the terms of the power show that an absolute sale and conversion was alone contemplated, a mortgage is not authorised (*s*). A power to mortgage imports a mortgage with a power of sale (*t*).

Power to raise charge by sale or mortgage.

A charge upon or trust to raise money by "the rents and profits" of land is not, in general, restricted to the *annual* rents and profits, and will authorise a sale or mortgage of the land (*u*). A trust to raise a charge out of rents and profits by leasing for lives at the accustomed rent was held to be restricted to that mode of raising the charge and not to authorise a sale or mortgage (*x*).

By rents and profits.

An annuity may be charged generally upon the land, or upon the annual profits only, without resort to the land; also in the latter case it may be charged upon the profits of the current year only, without any continuing charge for arrears, or arrears may also continue charged upon the annual profits. The incidence of the charge in these respects depends upon the construction of the instrument creating the annuity, and the remedies against the land are restricted accordingly (*y*).

Charges of annuities.

In the case of instruments coming into operation after 31st December, 1881, a person "entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land, or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion," may distrain for arrears, or enter and take the profits in satisfaction of the arrears, or demise the land charged to a trustee for a term of years, on trust by mortgage, sale, or demise to raise the arrears; but these powers may be excluded or modified by the terms of the instrument (*z*). These powers were formerly expressly conferred as a

(*v*) *Wareham v. Brown*, 2 Vern. 153; *Bateman v. Bateman*, 1 Atk. 421.

(*s*) *Huldenby v. Spofforth*, 1 Beav. 390; *Ball v. Harris*, 4 My. & Cr. 264; *Stroughill v. Austey*, 1 De G. M. & G. 635; *Re Bellinger*, [1898] 2 Ch. 534; 67 L. J. C. 580.

(*t*) *Cruikshank v. Duffin*, L. R. 13 Eq. 555. See *Thorne v. Thorne*, [1893] 3 Ch. 196; 63 L. J. C. 38.

(*u*) *Alban v. Backhouse*, 2 Ves. & B. 65; Jac. 651; *Bootle v. Blundell*, 1 Mer. 193; *Metcalf v. Hutchinson*, 1 Ch. D. 591; 42 L. J. C. 210; *Re Green*, 40 Ch. D. 610; 58 L. J. C. 157. So an unlimited gift of income *primâ facie* imports a gift of the capital of personal

estate, *Page v. Leapingwell*, 18 Ves. 463; *Haig v. Swiney*, 1 Sim. & St. 487; *Blann v. Bell*, 2 De G. M. & G. 775; 22 L. J. C. 236.

(*x*) *Ivy v. Gilbert*, 2 P. Wms. 13. See as to the restricted construction of a charge on profits, *Wilson v. Halliley*, 1 Russ. & M. 590; *Playters v. Abbott*, 2 M. & K. 110; *Re Green*, 40 Ch. D. 610.

(*y*) *Carmichael v. Gee*, 5 App. Cas. 588; 49 L. J. C. 829; *Wormald v. Muzeen*, 50 L. J. C. 776; *Re Bigge*, [1907] 1 Ch. 714; 76 L. J. C. 413.

(*z*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44. See Copyhold Acts, 1887, s. 16,

general rule, and where conferred the court would refuse to appoint a receiver (*a*), but since the Judicature Act, 1873, the court may, in the exercise of its statutory power, appoint one wherever it may be "just or convenient" (*b*). The court may also order a sale to satisfy the arrears, but the order is discretionary (*c*), and the annuitant will generally be restricted to those remedies which have been appointed for securing payment (*d*).

Power to discharge by receipt.

The persons entitled to charges on land or the money to be raised under trusts for sale were regarded as the equitable owners of the land *pro tanto*; and therefore, as a general rule, a purchaser of land subject to charges had to pay the purchase money to the persons entitled to the charges, or see that it was rightly applied in paying them, if the estate was vested in trustees; otherwise the land might remain subject to the charges in his hand (*e*).

Express.

But an express power in the trustee to give receipts to the purchaser might relieve a purchaser from seeing to the application of the money; and an express clause to that effect was commonly inserted in trusts conferring powers to raise money by sale or mortgage (*f*). Statutory provision is now made for the exoneration of persons paying, transferring, or delivering any money, security, or other personal property or effects from seeing to the application or being answerable for any loss or misapplication thereof where they take a receipt in writing (*g*).

Implied in charge to pay debts.

The power to give receipts, if no express power were given, might be implied from the purpose of the trust or charge according to the following rules:—If the trust or charge were created for the payment of debts generally, a purchaser was not bound to see that the purchase money was rightly applied; by reason of the indefinite nature of the trust or charge, which the purchaser is unable to ascertain (*h*). If the trust or charge were for the payment of specified or scheduled debts to certain creditors, the general rule prevailed, and the purchaser was bound to see that

Charge to pay specified debts.

and 1894, s. 27 (*e*); Improvement of Land Act, 1893, s. 3.

(*a*) *Sollory v. Leaver*, L. R. 9 Eq. 22; 40 L. J. C. 398; *Kelsey v. Kelsey*, L. R. 17 Eq. 495.

(*b*) See *Tyllett v. Niron*, 25 Ch. D. 238; 53 L. J. C. 199; *Mason v. Westoby*, 32 Ch. D. 206; 55 L. J. C. 507; *Ite Prytherch*, 42 Ch. D. 590; 59 L. J. C. 79.

(*c*) *Cupit v. Jackson*, 13 Price, 721; *Hambro v. Hambro*, [1894] 2 Ch. 564; 63 L. J. C. 627.

(*d*) *Hall v. Hurt*, 2 J. & H. 76;

*Blackburne v. Hope-Edwards*, [1901] 1 Ch. 419; 70 L. J. C. 99.

(*e*) See *Elliot v. Merriman*, Barnard. 78; 2 Wh. & T. L. C. 897, and notes.

(*f*) See *Keon v. Magawley*, 1 Dr. & War. 401; *Stroughill v. Anstey*, 1 De G. M. & G. 635; 21 L. J. C. 130.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20. See also Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 40.

(*h*) *Smith v. Guyon*, 1 Bro. C. C. 186; *Shaw v. Borrer*, 1 Keen, 559; *Ball v. Harris*, 4 M. & Cr. 264; *Robinson v. Lowater*, 5 De G. M. & G. 272.



the money was rightly applied (*i*). And so also if the trust or charge were for the payment of legacies to certain persons (*k*).

Or legacies.

If the trust or charge were for the payment of debts and legacies, including annuities, the purchaser was not bound to see to the application of the purchase money, for the debts were indefinite and took priority of the legacies. And it seems that it was not material in such case that the purchaser knew that there were no debts, or that all the debts had been paid, leaving the legacies as the only charge; for the implied power to give receipts arises upon the construction of the will, independently of the circumstances (*l*).

Charge to pay debts and legacies.

The Administration of Estates Act, 1833, making the real estate of a deceased person assets for the payment of all his debts as against the heir or devisee, does not create a charge of the debts upon the land, so as to exempt a purchaser from seeing to the application of his purchase money in payment of legacies or other specific charges (*m*).

If the trust directs an immediate sale for purposes not immediately ascertainable, there is an implied power in the trustee to give receipts, and which is independent of subsequent events (*n*). So where the proceeds of the sale are payable to infants who are not capable of signing receipts (*o*). So where it is required that the trustees should hold the proceeds for the purposes of the trust (*p*); or should re-invest the proceeds (*q*).

Sale for purposes not ascertained.

In all cases, though there be a power in the trustees selling the land to give receipts to the purchaser, if the purchaser have notice that the sale is made improperly or for the purpose of misapplying the money, he may become chargeable as participating in the breach of trust (*r*).

Notice of breach of trust.

Executors take the personal estate of the testator, including the leaseholds and chattels real, *virtute officii*, with an absolute power to sell, mortgage or pledge it for the payment of debts and the general purposes of the will; and a purchaser or mortgagee from the executor is not bound to see to the application

Power in executors to give receipts.

(*i*) *Spalding v. Shalmer*, 1 Vern. 301; *Cotterel v. Hampson*, 2 Vern. 5.

(*k*) *Dickinson v. Dickinson*, 3 Bro. C. C. 19; *Horn v. Horn*, 2 Sim. & St. 448; *per* Lyndhurst, L. C., *Johnson v. Kennet*, 3 M. & K. 630.

(*l*) *Johnson v. Kennet*, 3 M. & K. 624; *Forbes v. Peacock*, 1 Phill. 717; *Stroughill v. Austey*, 1 D. M. & G. 635; 22 L. J. C. 130; *Re Henson*, [1908] 2 Ch. 356; 77 L. J. C. 598.

(*m*) See *Horn v. Horn*, 2 S. & S. 448; and see *ante*, p. 191.

(*n*) *Balfour v. Welland*, 16 Ves. 151.

(*o*) *Sowarsby v. Laey*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46.

(*p*) *Doran v. Wiltshire*, 3 Swanst. 699.

(*q*) *Locke v. Lomas*, 5 De G. & S. 329; 21 L. J. C. 503.

(*r*) *Stroughill v. Austey*, 1 De G. M. & G. 635; *Howard v. Chaffers*, 2 Dr. & Sm. 236; 32 L. J. C. 686; *Carlyon v. Truscott*, L. R. 20 Eq. 348; 44 L. J. C. 186.

Notice that  
sale improper.

of the money (s). But if the sale or mortgage is a fraud upon the estate, or made for the purpose of misapplying the money, to the knowledge of the purchaser or mortgagee, as a sale or mortgage to a creditor of the executor for his own debt, the person so acquiring the assets will be chargeable with the full value to the creditors and legatees (t).

Discharge of  
charge by  
court.

The fetters which charges imposed upon the free alienation of land were in a large measure removed by sect. 5 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enables the court to order a sale of land free from incumbrances upon proper provision being made for satisfying the charge.

#### § 4. MORTGAGES.

Mortgage by conveyance with proviso for redemption—redemption—foreclosure—power of sale—covenant to pay debt and interest—right of mortgagee to pursue all his remedies.

Mortgage by conveyance upon trust for sale.

Estate of mortgagor—mortgage in fee—mortgage of term of years—special reservation of in mortgage deed—surplus proceeds of sale under the mortgage.

Liability of the personal estate for the mortgage debt—Statutory amendments making the land primarily liable.

Mortgagor in possession at law—tenant under mortgagor—redemise to mortgagor or attornment—possessory rights.

Charge of mortgagee for the debt—legal estate in the land—devise by mortgagee—statutory amendment of the law.

Mortgagee in possession bound to account—annual rests—costs of repair, etc.—receiver—insurance.

Distinction between a mortgagee and a trustee.

Equitable mortgage by deposit of deeds—agreement as to the deposit—remedy of equitable mortgagee.

Equitable mortgage by agreement without deposit.

Mortgage of copyholds—of leaseholds—of equitable estates and interests—notice to the trustee.

Mortgage by  
conveyance  
with proviso  
for redemp-  
tion.

A mortgage is a charge upon land created for the security of money lent. The ordinary form of a mortgage is by an absolute conveyance at law to the mortgagee; subject to an express *proviso for redemption*, that upon payment of the debt and interest at an appointed day, the mortgagee shall reconvey to the

(s) *Eicer v. Corbett*, 2 P. Wms. 148; *Miles v. Durnford*, 2 De G. M. & G. 641; *Gray v. Johnston*, L. R. 3 H. L. 1; *Berry v. Gibbons*, L. R. 8 Ch. 747; 42 L. J. C. 897; *Graham v. Drummond*, [1896] 1 Ch. 968; 65 L. J. C. 472.

See *Thorne v. Thorne*, [1893] 3 Ch. 196; 63 L. J. C. 38.

(t) *Bonney v. Ridgard*, 1 Cox, 145; *Hill v. Simpson*, 7 Ves. 152; *McLeod v. Drummond*, 17 Ves. 152.

mortgagor (*a*). An earlier form by way of conveyance upon condition at common law defeating the estate in the event of payment at an appointed day has been obsolete for many years (*b*).

At law if the money were not paid at the appointed day the title of the mortgagee was absolute, but in a court of equity the mortgagor was entitled to come in, within a reasonable time (which varied according to the circumstances) after the period fixed for redemption had expired, and obtain a reconveyance of the property upon terms, which were generally the payment of the principal not repaid, all arrears of interest, and the costs of action, but might include other matters (*c*). This right is known as an equity of redemption, and is an equitable estate (*d*). This right has sometimes been rested upon the principle that in a court of equity time was not generally considered as of the essence of the contract where land was being dealt with, but it is to be observed that, in the case of a mortgage, by no express terms could the right be restricted, whereas, in the case of a contract for the sale and purchase of land, the agreement of the parties to make time of the essence of the contract was always respected (*e*); and the rule that time was not essential does not seem to have been extended to other contracts (*f*). But there is another ground upon which the interference of the Court of Chancery may be rested, namely, relief against forfeiture where money afforded an adequate compensation (*g*). An absolute conveyance, which reserves to the seller the right to repurchase the property, is valid; and in this case the right can only be exercised within the time appointed, and if the day be allowed to pass there is no relief in equity (*h*). Evidence is admissible to show that a transaction ostensibly an absolute conveyance

Equity of redemption.

(*a*) See Batler's note (I) to Co. Lit. 205 *a*; 1 Pridaux Conv. 525; Davidson Conv., Part II.

(*b*) See objection to this form stated by Chitty, L. J., *Durham Bros. v. Robertson*, [1898] 1 Q. B. at p. 772; 67 L. J. Q. B. 484. The form was sometimes used as late as 1840, see *Rogers v. Grazebrook*, 8 Q. B. 895.

(*c*) See Grant, M. R., *Jones v. Gibbons*, 9 Ves. 407; Farwell, J., *Powell v. Brodhurst*, [1901] 2 Ch. 160; 70 L. J. C. 587; *Hill v. Rowlands*, [1897] 2 Ch. 361; 66 L. J. C. 689. See *Peirce v. Bullard, King & Co.*, [1908] 1 Ch. 780; 77 L. J. C. 340.

(*d*) *Cusborne v. Scarfe*, 1 Atk. 603; 2 Wh. & T. L. C. 6; *Turn v. Turner*, 39 Ch. D. 456; 57 L. J. C. 1085; *Mainland v. Upjohn*, 41 Ch. D. 126; 58

L. J. C. 361.

(*e*) *Howard v. Harris*, 1 Vern. 190; 2 Wh. & T. L. C. 11; *Seton v. Slade*, 7 Ves. at p. 273; *Hudson v. Temple*, 29 Beav. 536; 30 L. J. C. 251; *Soper v. Arnold*, 14 App. Cas. 429; 59 L. J. C. 214.

(*f*) Cotton, L. J., *Reuter v. Sala*, 4 C. P. D. 239, 249. The case of *Patrick v. Milner*, 2 C. P. D. 342, stands alone.

(*g*) *Peachy v. Somerset (Duke)*, 1 Stra. 447; 2 Wh. & T. L. C. 259; *Sloman v. Walter*, 1 Bro. C. C. 418; 2 Wh. & T. L. C. 257. See *ante*, p. 180.

(*h*) *Williams v. Owen*, 5 My. & Cr. 303; 12 L. J. C. 207; *Perry v. Meddowcroft*, 4 Beav. 197; affd. 12 L. J. C. 104. See *Salt v. Northampton (Marq.)*, [1892] A. C. 1; 61 L. J. C. 49.

is, in fact, a mortgage, but the burden of proof is upon the party disputing the apparent effect of the deed (*i*).

Notice to redeem.

Where the mortgage is by deed, if the mortgagor allow the time appointed for payment to pass, he must give six months' notice before he can redeem; and if he do not then exercise his right, he must renew the notice; or he may pay six months' interest in lieu of notice (*k*). The foundation of this rule is that a mortgage by deed is a permanent investment, and it is only equitable to give the mortgagee sufficient time to find another suitable permanent investment for his money. Conversely, if the mortgage is by deposit of title deeds, which is the usual form employed in the case of loans of a temporary character, the mortgagee is not entitled to notice of intention to pay off, unless he makes an express stipulation to that effect (*l*). So, too, if a mortgagee shows by his conduct that he is prepared to receive immediate payment, as by instituting proceedings to recover his debt (*m*), or by carrying in a proof in an action to administer the estate of a deceased mortgagor (*n*), or by consenting in an action to the sale of the estate in mortgage (*o*), or by exercising his power of sale (*p*), he dispenses with the obligation to give him notice.

Mortgagee refusing tender liable for costs of redemption. Redemption at law by statute.

If the mortgagee refuse the tender of payment at the expiration of the notice, the amount tendered being sufficient, he will be liable for the costs of a suit for redemption (*q*).

Courts of common law were empowered by statute in actions brought by mortgagees for the debt or an action of ejectment for the land to stay proceedings and compel a reconveyance, on payment of the principal, interest, and costs (*r*).—By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, any division of the High Court has full power to give effect to every equitable ground of relief or defence to which the

(*i*) *Langton v. Horton*, 5 Beav. 9; *Holmes v. Mathews*, 9 Moo. P. C. 413. *Douglas v. Culverwell*, 3 Giff. 251, 4 De G. F. & J. 20, is of questionable authority, for not only was the plaintiff, a *particeps criminis*, allowed to plead affirmatively that the transaction was illegal—see *Ayerst v. Jenkins*, L. R. 16 Eq. 275—but also that the legal effect of the deed was misrepresented to him. See *Hawatson v. Webb*, [1908] 1 Ch. 1; 77 L. J. C. 32.

(*k*) *Day v. Day*, 31 Beav. 270; *Spencer-Bell to L. & S. W. Ry.*, 33 W. R. 771; *Smith v. Smith*, [1891] 3 Ch. 550. See *Hill v. Rowlands*, [1897] 2 Ch. 361; 66 L. J. C. 689.

(*l*) *Fitzgerald's Trustee v. Mellersh*, [1892] 1 Ch. 385; 61 L. J. C. 231. See

*post*, p. 216.

(*m*) *Letts v. Hutchins*, L. R. 13 Eq. 176; *Re Alcock*, 23 Ch. D. 372.

(*n*) *Matson v. Swift*, 5 Jur. 645.

(*o*) *Re Moss*, 31 Ch. D. 90; 55 L. J. C. 87.

(*p*) *Banner v. Berridge*, 18 Ch. D. 254; 50 L. J. C. 630.

(*q*) *Harmer v. Priestly*, 16 Beav. 569; 22 L. J. C. 1041; *Greenwood v. Sutcliffe*, [1892] 1 Ch. 1; 61 L. J. C. 59. As to tender by a stranger or by a person having a partial interest only in the equity of redemption, see *Pearce v. Morris*, L. R. 5 Ch. 227; *Turn v. Turner*, 39 Ch. D. 456; 57 L. J. C. 1085.

(*r*) 7 Geo. 11. c. 20; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 219.

mortgagor may be entitled against the claim of the mortgagee. But by sect. 34, sub-sect. 3, of the statute, actions for redemption or foreclosure are primarily assigned to the Chancery Division.

The mortgagee, on the other hand, after default in payment Foreclosure. may take proceedings to enforce his security and make his title complete in equity by foreclosing the mortgagor. It is customary now to embody in one order the relief which the mortgagee could formerly obtain in several actions. The mortgagee has an immediate judgment for payment of the mortgage debt; an account is directed of what is due to the mortgagee upon his security after deducting the amount recovered from the mortgagor under the immediate judgment for payment of the mortgage debt; that in the event of payment within a limited time (usually six months) of the amount found due on taking the account the mortgagee is to reconvey the mortgaged property, and in default of payment the mortgagor is to stand foreclosed, or barred, from his right of redemption (*s*). The order for foreclosure absolute vests a new estate in the mortgagee (*t*), his title accruing from the date of the order, and not from the date of the judgment (*u*). An order for foreclosure absolute is not final, but the mortgagor may upon applying within a reasonable time re-open the foreclosure, and redeem the property (*x*).

If there be a charge *simpliciter*, and not a mortgage, or an agreement for a mortgage, then the right of the parties having such a charge is a sale and not foreclosure (*y*). The court is now invested with power to order a sale in the case of a mortgage (*z*). Alternative remedy of sale or foreclosure.

It was usual in a mortgage deed to give to the mortgagee an express power of sale (*a*); but it did not supersede or affect the remedy of foreclosure (*b*); but after the judgment in foreclosure, and before the order was made for foreclosure absolute, the power could only be exercised by leave of the court (*c*). A power to mortgage imports a mortgage with a power of sale (*d*). Power of sale.

(*s*) *Farrer v. Lacy, Hartland & Co.*, 31 Ch. D. 42; 55 L. J. C. 149. See *Poulett (Earl) v. Hill (Visc.)*, [1893] 1 Ch. 277; 62 L. J. C. 466.

(*t*) *Pugh v. Heath*, 7 App. Cas. 235; 51 L. J. Q. B. 367; *Harlock v. Ashberry*, 19 Ch. D. 539; 51 L. J. C. 394.

(*u*) *Thompson v. Grant*, 4 Madd. 438.

(*x*) *Wichalse v. Short*, 3 Bro. P. C. 558; *Campbell v. Holyland*, 7 Ch. D. 166; 47 L. J. C. 145.

(*y*) *Tennant v. Trenchard*, L. R. 4 Ch. 537; 38 L. J. C. 661; *Re Owen*,

[1894] 3 Ch. 220; 63 L. J. C. 749. See *Carter v. Wake*, 4 Ch. D. 605; 46 L. J. C. 841.

(*z*) See *post*, p. 206.

(*a*) See *Colson v. Williams*, 58 L. J. C. 539.

(*b*) *Wayne v. Hanham*, 9 Hare, 62; 20 L. J. C. 530.

(*c*) *Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857; 72 L. J. C. 764.

(*d*) *Chawner's Will*, L. R. 8 Eq. 569; 38 L. J. C. 726.

The power of sale was preferably made exercisable, after the death of the mortgagee, by his executors and administrators, in order that it might accompany the debt which passed to them as being personal estate (*e*).

Statutory  
power of sale.

A mortgage by deed has now incident to it a statutory power of sale. In form it follows the older express power, but may be modified or excluded by the parties. The earlier statute—the Trustees and Mortgagees Act, but better known as Lord Cranworth's Act—applies to deeds executed after 28th August, 1860, and before 1st January, 1882; the later statute—the Conveyancing and Law of Property Act, 1881—applies to deeds executed after 31st December, 1881 (*f*).

Court may  
direct a sale  
instead of  
foreclosure.

*Primâ facie* foreclosure was the proper remedy of a mortgagee, and the Court of Chancery would only direct a sale in a suit for foreclosure under exceptional circumstances (*g*). The court was first invested with a discretionary power of sale by the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 48, and the statutory provision now in force is contained in sect. 25 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) (*h*).

Covenant to  
pay mortgage  
debt.

It is also usual for the mortgagor to covenant in the mortgage deed to repay the money; which gives the mortgagee a personal remedy by action and constitutes the loan a specialty debt (*i*).—A covenant to secure a loan by a mortgage deed to contain usual covenants has a like effect in converting the debt into a specialty (*j*).

And interest.

The covenant is usually extended to the payment of the interest; but unless the covenant for payment of interest extends beyond the period fixed for repayment of the principal, interest will only be recoverable as damages, and the rate will not be measured by that expressly fixed (*k*).

Separate bond  
for the debt. <sup>1</sup>

This personal security may be given by a separate instrument, as a bond, instead of the covenant in the mortgage deed; which

(*e*) See *Thornbrough v. Baker*, 1 Ch. Cas. 283; 2 Wh. & T. L. C. 1.

(*f*) 23 & 24 Vict. c. 145, ss. 11, 13, 14, 24, 32, 34; 44 & 45 Vict. c. 41, ss. 19, 20, 21.

(*g*) *Sampson v. Pattison*, 1 Ha. 533; *Cockburn v. Annett*, 3 W. R. 641; *Hutton v. Sealy*, 27 L. J. C. 263.

(*h*) See Carson, Real Prop. Stats. p. 581.

(*i*) *Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J. Ex. 150. This covenant and that for payment of interest is now

implied in the statutory mortgage under the Conveyancing and Law of Property Act, 1881, sect. 26.

(*j*) *Saunders v. Milsome*, L. R. 2 Eq. 573.

(*k*) *Re Roberts*, 14 Ch. D. 49. See, as to the amount of arrears of interest recoverable, *Hunter v. Nockolds*, 1 Mac. & G. 640; 19 L. J. C. 177; *Dingle v. Coppen*, [1899] 1 Ch. 726; 68 L. J. C. 337; *Re Lloyd*, [1903] 1 Ch. 385; 72 L. J. C. 78

has the advantage of enabling the mortgagee, upon a sale of the land, to deliver over the mortgage deed to a purchaser, and retain the bond for the purpose of his personal remedy, in case the proceeds of the sale should prove insufficient.—Where trustees raise money on mortgage, it is usual for the equitable owners only and not the trustees to execute the personal covenants required, and, as against the trustees, the land is the only security (*l*).

With the divided jurisdictions of the courts prior to the Judicature Act, 1873, it was competent to the mortgagee to enforce all his remedies concurrently and in different courts (*m*); but since that statute the practice is to give in one action all the relief to which a mortgagee was formerly entitled in several proceedings (*n*). A mortgagee may limit his claim to particular items of relief (*o*), and would perhaps not be held to have waived his rights by this line of conduct (*p*); but the court would probably discountenance any attempt to enforce his remedies in court piecemeal. The remedies available to the mortgagee are so connected as that whatever is realized from the one must be allowed in discharge of the other. Thus, if he exercises the power of sale and does not realize the amount of his charge, he may still proceed upon the covenant for the balance; so, if he forecloses, he may proceed upon the covenant; but in either case *he opens the foreclosure*, that is he gives to the mortgagor a renewed right to redeem. Hence in order to proceed upon the covenant after a foreclosure, he must remain in a position to give redemption; and if he sells the estate, though for less than the amount of the debt, or otherwise puts it out of his power to reconvey, he can no longer pursue any remedy for the deficiency (*q*).

Right of mortgagee to pursue all his remedies.

Proceeding for the debt, after foreclosure.

A mortgage is sometimes made in the form of a conveyance to the mortgagee or his trustee upon an express trust to sell, after default in payment, and out of the proceeds to pay the debt, interest and costs to the mortgagee, and the surplus to the mortgagor. This is strictly a mortgage in that the mortgagor has only the ordinary right to redeem before the trust for sale is

Mortgage by express trust for sale.

(*l*) 1 Pridaux, Conv. 659, *n*; 2 Davidson, Conv., Part II., 461, *n*.

(*m*) *Rees v. Parkinson*, 2 Anstr. 497; *Colby v. Gibson*, 3 Smith, 516.

(*n*) *Farrer v. Lacy, Hartland & Co.*, 31 Ch. D. 42; 55 L. J. C. 149.

(*o*) See *Dingle v. Coppen*, [1899] 1

Ch. 726; 68 L. J. C. 337.

(*p*) See and dist. *Laming v. Gee*, 10 Ch. D. 715; 48 L. J. C. 196.

(*q*) *Lockhart v. Hardy*, 9 Beav. 349; *Palmer v. Hendrie*, 27 Beav. 349; 28 Beav. 341; *Kinnaird v. Trollope*, 39 Ch. D. 636; 58 L. J. C. 566.

executed (*r*) ; but he cannot enforce a sale (*s*). A security by way of trust for sale does not convert the mortgagee into a trustee for the mortgagor (*t*).

Estate of mortgagor.

Mortgage in fee.

In equity, the mortgagor is still considered as the owner of the land, subject to the charges secured to the mortgagee (*u*). The equity of redemption of land mortgaged in fee is regarded as part of the original beneficial ownership, and of the nature of real estate. It may be conveyed and limited in various estates, or devised by will, or left to descend to the heir ; and the person or persons becoming entitled by conveyance, descent or devise may exercise the right to redeem, and have a reconveyance according to their respective estates and interests (*v*).

Equity of redemption made assets in equity.

The equity of redemption of a mortgage in fee was held not to be assets by descent in the hands of the heir for payment of the specialty creditors of the deceased ancestor, within the Statute of Frauds, 29 Car. II. c. 3, s. 10, which enacted that trusts in fee simple should be assets by descent. But it was made equitable assets by the Court of Chancery, upon the principle that if a specialty creditor applied to redeem, the court would grant redemption only in favour of all the creditors equally without distinction as to priority (*w*). The Administration of Estates Act, 1883, was held to extend to an equity of redemption in fee, thus putting it in the position of legal assets by descent (*x*). An equity of redemption would now be legal assets by force of Part I. of the Land Transfer Act, 1897 (*y*).

Mortgage of term of years.

The equity of redemption of a term of years, or chattel interest in land, retains the original quality of personal estate and passes to the executor, *virtute officii*, and is legal assets, although the right can be enforced only by suit in equity (*z*).

Effect of reservation of equity of redemption in mortgage deed.

Difficulties have sometimes arisen where the reservation of the equity of redemption has not strictly followed the devolution of the property according to the original title. The later cases allow a formal reservation of the equity in variance of the former

(*r*) *Bell v. Carter*, 17 Beav. 11 ; 22 L. J. C. 933.

(*s*) *Locking v. Parker*, L. R. 8 Ch. 30 ; 42 L. J. C. 257.

(*t*) *Kirkwood v. Thompson*, 2 De G. J. & S. 613 ; *Re Alison*, 11 Ch. D. 284.

(*u*) *Fairclough v. Marshall*, 4 Ex. D. 37. See *Van Gelder, Apsimon & Co. v. Sowerby Bridge United Dist. Flour Soc.*, 44 Ch. D. 374 ; 59 L. J. C. 292.

(*v*) *Casborne v. Scarfe*, 1 Atk. 603 ; 2 Wh. & T. L. C. 6 ; and notes.

(*w*) *Solley v. Gower*, 2 Vern. 61 ; *Plunket v. Penson*, 2 Atk. 290 ; Butler's note to Co. Lit. 208 *b*.

(*x*) *Foster v. Handley*, 1 Sim. N. S. 200. See *ante*, p. 191.

(*y*) *Re Harrowby and Paine*, [1902] W. N. p. 137.

(*z*) *Cook v. Gregson*, 3 Drew. 547 ; 25 L. J. C. 706. See *ante*, p. 193.



title as sufficient evidence of an intention to resettle the equity of redemption (*a*).

A mortgage, though attended with an absolute power of sale or trust for sale, has no constructive effect in equity as a conversion of the land into personalty beyond the amount of the debt charged upon it. A sale would effect a conversion if made in the lifetime of the mortgagor, but not if made after his death; and in determining whether a conversion has been effected it is immaterial whether the surplus is expressed in the deed to be payable to the real or to the personal representatives of the mortgagor (*b*).

Surplus proceeds of sale under the mortgage.

Until the passing of the statutes hereafter mentioned the Court of Chancery adjusted the rights of the parties claiming beneficially as representatives of a deceased person, according to a presumed intention of the deceased. Where a mortgage debt had been contracted by the deceased, the heir or devisee was entitled to have the amount of the charge made good out of the personal estate which had been increased in value to that extent; but if the mortgage debt had not been created by the deceased himself (as where he purchased land subject to a mortgage debt) the right to have it paid off out of personalty was negatived, unless the deceased had by subsequent acts adopted the charge as his own, as was also the case where it could be shown that the personal estate had not in fact been increased in value (*c*).

Liability of the personal estate of mortgagor for mortgage debt.

By the Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), the mortgaged land, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof, is made primarily liable in the hands of the heir or devisee to satisfy the charges thereon unless the deceased shall, by his will, deed, or other document, have signified any contrary or other intention (*d*). The Real Estate Charges Act, 1867 (30 & 31 Vict. c. 69), effected two amendments. By sect. 1 a general declaration that the debts or that all the debts of a testator shall be paid out of personal estate is not a sufficient expression of intention to exonerate the property charged. If

Statutory amendments making the mortgaged land primarily liable for the debt.

(*a*) *Dawson v. Whitehaven (Bank)*, 8 Ch. D. 219; *Plomley v. Felton*, 14 App. Cas. 61; 58 L. J. P. C. 50.

(*b*) *Wright v. Rose*, 2 Sim. & S. 323; *Bourne v. Bourne*, 2 Hare, 35; *Re Clarke's Trusts*, 22 L. J. C. 230; *Re Grange*, [1907] 2 Ch. 20; 76 L. J. C. 456.

(*c*) *Ancaster (Duke) v. Mayer*, 1 Bro. C. C. 454; 1 Wh. & T. L. C. 1; *Davies*

*v. Bush*, 4 Bli. N. S. 305, and note; *Loosemore v. Knapman*, Kay, 123; 23 L. J. C. 174; *Field v. Moore*, 7 De G. M. & G. 691.

(*d*) See *Syer v. Gladstone*, 30 Ch. D. 614; *Re Campbell*, [1893] 2 Ch. 206; *Re Anthony*, [1893] 3 Ch. 498; 62 L. J. C. 1004; *Smith v. Morston*, 37 L. J. C. 6.

there be a direction in a will that part of the testator's real property shall bear the burdens upon it, the other part of the real estate will be exonerated by implication, *expressio unius exclusio alterius* (*e*). By sect. 2 of the same statute a vendor's lien for unpaid purchase money upon any lands or hereditaments purchased by a testator (*f*) is to be deemed a mortgage within the meaning of the Acts. The Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), provides that the two previous statutes shall, as to any testator dying after 31st December, 1877, be held to extend to "a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments, of whatever tenure, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee (*g*) or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate." The decisions on the earlier of these statutes tended to restrict the amendment of the law within very narrow limits, but the tendency of the modern decisions is to regard the Act of 1877 as a legislative declaration that a liberal interpretation was in fact intended, and to extend rather than restrain the effect of the expressions used (*h*). Accordingly, where land is taken in execution under a writ of *elegit*, the devisee must discharge so much of the judgment debt as is unsatisfied at the testator's death (*i*); and a rent-charge issuing out of a chattel real is not payable primarily out of the pure personal estate (*j*). So money payable under a building agreement has by a liberal extension of the statutes been treated as in the nature of unpaid purchase money (*k*). An intention to exclude the application of the statutes may be collected from a series of documents (*l*).

(*e*) *Re Valpy*, [1906] 1 Ch. 531; 75 L. J. C. 301.

(*f*) *Harding v. Harding*, L. R. 13 Eq. 493; 41 L. J. C. 523.

(*g*) *Re Wilson*, [1908] 1 Ch. 839; 77 L. J. C. 564.

(*h*) See *Re Kidd*, [1894] 3 Ch. at p. 560; 63 L. J. C. 855; *Re Fraser*, [1904] 1 Ch. at p. 735; 73 L. J. C. 481.

(*i*) *Re Anthony*, [1892] 1 Ch. 450; 61 L. J. C. 434.

(*j*) *Re Fraser*, [1904] 1 Ch. 726; 73 L. J. C. 481.

(*k*) *Re Kidd*, [1894] 3 Ch. 558; 63 L. J. C. 855.

(*l*) *Re Campbell*, [1893] 2 Ch. 206; 62 L. J. C. 594; *Smith v. Moreton*, 37 L. J. C. 6.

Unless the mortgage deed provide to the contrary, a mortgagee is entitled to enter, or to bring an action of ejectment, without giving any notice to quit or making any demand of possession (*m*). It may not be out of place to point out that a mortgagor in possession is neither tenant at will nor tenant at sufferance to the mortgagee, although his tenure in some respects resembles those tenures (*n*). It is also to be observed that a mortgagee does not stand in a fiduciary relation to the mortgagor (*o*).

Mortgagor in possession.

A tenant under the mortgagor, let into possession since the mortgage, was in the like position, unless the mortgagee recognised and adopted his tenancy (*p*). In the case of mortgages executed after 31st December, 1881, a mortgagor in possession may now by force of sect. 18 of the Conveyancing and Law of Property Act, 1881, unless his statutory power be qualified or excluded, grant leases binding upon the mortgagee (*q*). As between the mortgagor and his lessee, a lease, which is void as against the mortgagee, operates by *estoppel*, precluding the lessee from disputing a reversion in his lessor according to the terms of the lease, and his right to the rent, until an actual or constructive eviction by the mortgagee; and the covenants and liabilities of the lessee under the lease will run with such reversion (*r*).

Tenant under mortgagor.

The mortgagee cannot recover the mesne profits accrued before he actually takes possession or does what is equivalent; for the doctrine of relation of an entry to the original title, as between disseisor and disseisee, does not apply between mortgagor and mortgagee; but upon a claim made by the mortgagee the lessee of the mortgagor may pay his rent in future to him, thereby becoming tenant to him instead of the mortgagor, and such payment will be an answer to the claim of his lessor as amounting to an eviction (*s*). And it seems the tenant is also justified in paying over the arrears of rent accrued due and remaining unpaid at the time of the mortgagee claiming (*t*).

Claim of mortgagee to mesne profits.

(*m*) *Doe v. Day*, 2 Q. B. 147; *Doe v. Tom*, 4 Q. B. 615.

(*n*) *Birch v. Wright*, 1 T. R. 378; *Doe v. Giles*, 5 Bing. 421; *Doe v. Maisey*, 8 B. & C. 767; *Doe v. Day*, 2 Q. B. 147; *Doe v. Tom*, 4 Q. B. 615; *Morton v. Woods*, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81.

(*o*) See *post*, p. 216.

(*p*) *Keech v. Hall*, Dougl. 21; 1 Smith's L. C. 511 and notes.

(*q*) *Municipal Permanent Int. Bg. Soc. v. Smith*, 22 Q. B. D. 70; 58 L. J. Q. B. 61; *Wilson v. Queen's Club*, [1891] 3 Ch. 525; 60 L. J. C. 698; *John Brothers' Abergarw Brewery v.*

*Holmes*, [1900] 1 Ch. 188; 67 L. J. C. 149; *Brown v. Peto*, [1900] 2 Q. B. 653; 69 L. J. Q. B. 869.

(*r*) *Sturgeon v. Wingfield*, 15 M. & W. 224; *Doe v. Ongley*, 10 C. B. 25; *Cuthbertson v. Irving*, 6 H. & N. 135; 29 L. J. Ex. 485; *Morton v. Woods*, L. R. 4 Q. B. 293; 28 L. J. Q. B. 81.

(*s*) *Beans v. Elliot*, 9 A. & E. 342; *Litchfield v. Ready*, 5 Ex. 939; *Wilton v. Dunn*, 17 Q. B. 294; 21 L. J. Q. B. 60.

(*t*) *Pope v. Biggs*, 9 B. & C. 245; *Johnson v. Jones*, 9 A. & E. 809; *Underhay v. Read*, 20 Q. B. D. 209; 57 L. J. Q. B. 129.

Re-demise to  
mortgagor or  
attornment.

The relation of landlord and tenant may, however, be constituted between the mortgagee and mortgagor, as where the mortgage deed contains an express provision that the mortgagor may remain in possession until default in payment on the day appointed (*u*); or where the mortgagor attorns to the mortgagee as his tenant at a rent (*v*). Where a tenancy is in fact created, the mortgagee may distrain the goods of a stranger; but unless a tenancy is in fact created, extending beyond a mere personal licence to take the goods of the mortgagor in satisfaction of arrears of interest, the goods of a stranger cannot be so seized (*w*). A mortgagor who has attorned to a first mortgagee may give a valid power of distress by attorning to a puisne incumbrancer (*x*). Attornment clauses require to be registered as bills of sale to render a seizure of chattels valid, unless a mortgagee having previously taken possession, subsequently demises the premises to the mortgagor (*y*). Both in a court of law and in a court of equity an attornment clause was considered as intended to secure the mortgage debt as well as the interest (*z*). It afforded no answer to an action of ejectment brought without notice (*a*); and was avoided by a change of interest, as on the assignment of the mortgage, or the death of the mortgagor (*b*).

Possessory  
rights.

In equity the possession of the mortgagor is referred to his equitable title, and he is *prima facie* entitled to do any acts incident to a beneficial ownership, as cutting timber, or the like acts, unless the result will be to impair the sufficiency of the security (*c*). And the mortgagor will be restrained from exercising this right in an unusual or destructive manner (*d*).

(*u*) *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(*v*) *Morton v. Woods*, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81; *Ex p. Jackson*, 14 Ch. D. 725; *Ex p. Voisey*, 21 Ch. D. 442; 52 L. J. C. 121. See *Jolly v. Arbutnot*, 4 De G. & J. 224; 28 L. J. C. 547; *Clowes v. Hughes*, L. R. 5 Ex. 160; 39 L. J. Ex. 62.

(*w*) *Freeman v. Edwards*, 2 Ex. 732; *Kearsley v. Philips*, 11 Q. B. D. 621; 52 L. J. Q. B. 621.

(*x*) *Ex p. Punnett*, 16 Ch. D. 226; 50 L. J. C. 212.

(*y*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 6; *Ex p. Kennedy*, 21 Q. B. D. 384; *Green v. Marsh*, [1892] 2 Q. B. 331; 61 L. J. Q. B. 442. See *Mumford v. Collier*, 25 Q. B. D. 279; 59 L. J. Q. B. 552.

(*z*) *Ex p. Harrison*, 18 Ch. D. 127; 50 L. J. C. 832.

(*a*) *Doe v. Olley*, 12 A. & E. 481; *Doe v. Tom*, 4 Q. B. 615; 12 L. J. Q. B. 264; *Doe v. Goodier*, 10 Q. B. 957; 16 L. J. Q. B. 435; *Metrop. Counties and Gen. Life Assee. v. Brown*, 4 H. & N. 428; 28 L. J. Ex. 340.

(*b*) *Brown v. Metrop. Counties and Gen. Life Assee.*, 1 Ell. & E. 834; 28 L. J. Q. B. 236; *Scobie v. Collins*, [1895] 1 Q. B. 375; 64 L. J. Q. B. 10.

(*c*) *Humphreys v. Harrison*, 1 J. & W. 581; *King v. Smith*, 2 Hare, 239. See *Wright v. Atkins*, 1 V. & B. 313; *Goodman v. Kine*, 8 Beav. 379; *Bagnall v. Fillar*, 12 Ch. D. 812; 48 L. J. C. 695. As to leases by a mortgagor in possession, see *ante*, p. 211.

(*d*) *Humphreys v. Harrison*, 1 J. & W. 581; *Huddersfield Bkg. Co. v. Lister & Co.*, [1895] 2 Ch. 273; 64 L. J. C. 523.

The mortgagor is not bound to account for the rents and profits received by him while he remains in possession, notwithstanding the security may have become insufficient. "He receives the profits of the land for his own use, and not as agent or bailiff of the mortgagee, and when he has once received them, is absolutely entitled to keep them as his own" (e). Where a receiver has been appointed under the power contained in sect. 19 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), the mortgagor apparently ceases to be in possession (f).

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. (5)—"A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person" (g).

Mortgagor in possession may sue in his own name.

Until final order of foreclosure, the mortgagee though absolute owner at law, is entitled in equity only to a charge upon the land to the amount of the mortgage debt, interest, and costs. This includes not only the ordinary charges and expenses usually provided for by the instrument, but also the costs (if any) incident to realising the security, as those properly incurred in a foreclosure or redemption suit. The mortgagee is allowed all such costs in account, and the mortgagor cannot redeem without paying them (h).

Charge of mortgagee for debt, interest and cost.

The mortgage debt and charges, thus constituting the mortgagee's interest in the land in equity, is of the nature of personal estate, and passes on death to his personal representative (i). The legal estate in the land, upon a mortgage in fee,

Is personal estate.

Legal estate in land.

(e) *Per* Alderson, B., *Trent v. Hunt*, 9 Ex. 14; 22 L. J. Ex. 318; *Colman v. St. Albans (Duke)*, 3 Ves. 25; *Ex p. Wilson*, 2 V. & B. 252; *Garfitt v. Allen*, 37 Ch. D. 48; 57 L. J. C. 420. See *Re Anglesey (Marq.)*, L. R. 17 Eq. 283; 43 L. J. C. 437.

(f) *Woolston v. Ross*, [1900] 1 Ch. 788; 69 L. J. C. 363.

(g) *Fuirelough v. Marshall*, 4 Ex. D. 37. See *Van Gelder, ApSimon & Co. v. Sowerby Bridge United Dist. Flour Soc.*,

44 Ch. D. 374; 59 L. J. C. 63.

(h) *Cotterell v. Stratton*, L. R. 8 Ch. 295; 42 L. J. C. 417; *Cotterell v. Finney*, L. R. 9 Ch. 541; 43 L. J. C. 562; *Nat. Bk. of Australasia v. United Hand in Hand and Band of Hope Co.*, 4 App. Cas. 391; *Re Watts*, 22 Ch. D. 1.

(i) *Thornbrough v. Baker*, 1 Ch. Ca. 283; 2 Wh. & T. L. C. 1. See *Re Loveridge*, [1902] 2 Ch. 859; 71 L. J. C. 865.

Devise by  
mortgagee.

passed to the heir or devisee of the mortgagee, who became a trustee for the personal representative or person beneficially entitled to the debt and charges, but subject always to the equity of redemption of the mortgagor (*j*). In practice the complication which ensued from the devolution in different directions of the debt, and of the land upon which it was secured, was prevented by an express devise of mortgage estates to the personal representatives of the mortgagee; and a general devise of real estate passed estates held in mortgage, unless a contrary intention was expressed, or to be inferred from the purpose of the disposition (*k*).

Statutory  
amendment of  
law.

Sect. 4 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), empowered the personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee should have been admitted, to re-assure the mortgaged estate upon redemption. This provision was repealed and replaced by sect. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts that an estate of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, vested by way of mortgage in any person solely, on his death, notwithstanding any testamentary disposition, devolves upon his personal representatives. Copyholds were excluded from the operation of the last-mentioned section by sect. 45 of the Copyholds Act, 1887 (50 & 51 Vict. c. 73), the provisions of which are now embodied in sect. 88 of the consolidating statute the Copyholds Act, 1894 (57 & 58 Vict. c. 46), and they devolve upon the customary heir. The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 29, empowers the High Court, where a mortgagee of land (including copyholds) has died without taking possession, to make an order vesting the land in a person who has paid off the mortgage debt to the person entitled to receive the same, where the heir or personal representative or devisee of the mortgagee is out of the jurisdiction, or cannot be found, or refuses to reconvey the property, or where it is uncertain who is the proper person to reconvey; or the High Court may (under sect. 33 of the same statute) appoint a person to execute a conveyance of the land instead of making a vesting order. There is power to make a similar order in the case of an infant by sect. 28 of the same statute, and in the case of a lunatic by sect. 135 of the Lunacy Act, 1890 (53 Vict. c. 5) (*l*).

(*j*) See *Thornbrough v. Baker*, 1 Ch. Ca. 283; 2 Wh. & T. L. C. 1. See report, 3 Swanst. 628.

(*k*) *Braybrooke (Lord) v. Inskip*, 8

Ves. 417; Tud. L. C. 322. See *Re Carter*, [1900] 1 Ch. 801; 69 L. J. C. 426.

(*l*) See Carson, Real Prop. Stats. pp. 774, 778, 797.

A mortgagee who takes possession under his legal title is bound to account for all the rents and profits actually received by him, or which he ought to have received (*m*). In general, if the mortgagee takes possession, without any sufficient cause for entering, he must account with annual rests; that is to say, the surplus receipts after payment of interest will be applied annually in discharge of principal, leaving interest to run only on the balance. But if he enters because the interest is in arrear, or for the protection of his security, or other sufficient cause, he is not bound to receive payment in this mode, and he may continue to charge interest in full until the whole debt is discharged (*n*).

Account  
against mort-  
gagee in  
possession.  
Annual rests.

On the other hand, a mortgagee is entitled to charge in account the costs of all necessary repairs as a matter of right, and he is also entitled, upon making a proper case for the allowance, to an account of the sums expended in permanent and lasting improvements (*o*). He is also entitled to the costs of perfecting his title or rendering it available, or of defending the title to the property, but the costs of defending his mortgage he can only charge against the party impeaching his title (*p*). He may employ all necessary agents or receivers and charge for their payment;—but he is not entitled to charge any profit or remuneration for his personal services or trouble (*q*).

May charge  
cost of  
repairs, etc.

Receiver.

By sect. 19 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which replaces an earlier enactment to the same effect, a mortgagee whose mortgage is by deed executed after 31st December, 1881, may appoint a receiver when the mortgage money has become due; but this power may be excluded or modified by the deed itself.

A mortgagee could not, apart from a contract to that effect,

(*m*) *Anon.*, 1 Vern. 45; *Mayer v. Murray*, 8 Ch. D. 425; 47 L. J. C. 605. See *Nat. Bk. of Australasia v. United Land in Hand and Band of Hope Co.*, 4 App. Cas. 391.

(*n*) *Schulefield v. Ingham*, C. P. C. 477; *Wilson v. Ciuer*, 3 Beav. 136; *Patch v. Wild*, 30 Beav. 99; *Dobson v. Land*, 4 De G. & S. 575; *Ashworth v. Lord*, 36 Ch. D. 545; 57 L. J. C. 238; *Wrigley v. Gill*, [1905] 1 Ch. 241; 74 L. J. C. 160; *Arnsworth v. Wilding*, [1905] 1 Ch. 435; 74 L. J. C. 256.

(*o*) *Sandon v. Hooper*, 6 Beav. 246; 14 L. J. C. 120; *Powell v. Trotter*, 1 Dr. & Sm. 388; *Tipton Green Coll. v. Tipton Moat Coll.*, 7 Ch. D. 192; 47 L. J. C. 152; *Shepard v. Jones*, 21 Ch. D. 469; *Henderson v. Astwood*, [1894] A. C.

150.

(*p*) *Ramsden v. Langley*, 2 Vern. 536; *Peers v. Ceeley*, 15 Beav. 208; *Blackford v. Davis*, L. R. 4 Ch. 304; *Parker v. Watkins*, 1 Johns. 133; *Owen v. Crouch*, 5 W. R. 545; *Rees v. Met. Bd. of Wks.*, 14 Ch. D. 372; *Nat. Prov. Bk. of England v. Gumes*, 31 Ch. D. 582; 55 L. J. C. 576; *Wales v. Carr*, [1902] 1 Ch. 860; 71 L. J. C. 483. See *Ward v. Barton*, 11 Sim. 534; *Bollingbroke v. Hind*, 25 Ch. D. 795; 53 L. J. C. 704.

(*q*) *Langstaffe v. Fenwick*, 10 Ves. 405; *Davis v. Dendy*, 3 Madd. 170; *Union Bk. of London v. Lagram*, 16 Ch. D. 53; 50 L. J. C. 74. See *ante*, p. 114.

Power to insure and charge premiums.

charge in account the premiums for insuring the property (*r*), but in the case of a mortgage by deed, unless the power is excluded or modified by contract, he may by sect. 19 of the last-mentioned statute, which replaces sect. 11 of the 23 & 24 Vict. c. 145 (Lord Cranworth's Act), insure the mortgaged property from loss by fire, and add the premiums paid for any such insurance to the principal money secured at the same rate of interest.

Distinction between a mortgagee and a trustee.

Between mortgagee and mortgagor there is nothing analogous to a trust, until the whole mortgage debt has been paid and satisfied; from which moment, and not until then, the mortgagee becomes a trustee for the mortgagor (*s*).—The mortgagee may therefore, in general, purchase from the mortgagor or from a prior mortgagee exercising power of sale; and that whether he be in possession or not (*t*).—There is no trust to prevent the Statute of Limitations from operating in his favour (*u*).—Nor is the mortgagee constituted a trustee for the mortgagor by his mortgage being framed in the form of a conveyance upon trust to sell (*v*).

Equitable mortgage by deposit of deeds.

A deposit of the title deeds to secure a sum of money will create an *equitable mortgage* without any further formality. The agreement may be proved by parol evidence, notwithstanding the Statute of Frauds (29 Car. II. c. 3), s. 4, which requires a contract of any interest in land to be in writing signed; the fact of the adverse possession of the deeds admitting of explanation independently of the statute (*w*).

Deposit is presumptive evidence of mortgage.

The fact of depositing the deeds in the hands of a creditor is evidence between the parties of an agreement to secure the debt due or then contracted; but the depositee must establish affirmatively that a charge was "intended" to be created (*x*).

The delivery of title deeds for the purpose of preparing a legal

(*r*) *Dobson v. Land*, 8 Hare, 216; 4 De G. & Sm. 575; *Bellamy v. Bricken-dea*, 2 J. & H. 137; *Brooke v. Stone*, 34 L. J. C. 251.

(*s*) *Dobson v. Land*, 6 Hare, 216, 220; *Kirkwood v. Thompson*, 2 De G. J. & S. 613; 34 L. J. C. 305; 2 H. & M. 402. See *Cholmondeley v. Clinton*, 2 J. & W. at p. 182; *Banner v. Berridge*, 18 Ch. D. 254; *Warner v. Jacob*, 20 Ch. D. 220; 51 L. J. C. 642; *Taylor v. Russell*, [1892] A. C. 244; 61 L. J. C. 657.

(*t*) *Knight v. Majoribanks*, 2 Mac. & G. 10; *Shaw v. Bunny*, 2 De G. J. & S. 468; 34 L. J. C. 257; *Kirkwood v.*

*Thompson*, 2 De G. J. & S. 613; 34 L. J. C. 305.

(*u*) *Locking v. Parker*, L. R. 8 Ch. 30; 42 L. J. C. 257; *Re Alison*, 11 Ch. D. 284; *Re Loveridge*, [1904] 1 Ch. 518; 73 L. J. C. 15.

(*r*) *Re Alison*, 11 Ch. D. 284.

(*w*) *Russel v. Russel*, 1 Bro. C. C. 269; 2 Wh. & T. L. C. 76.

(*x*) *Featherstone v. Fenwick*, 1 Bro. C. C. 270, *n.*; *Hurford v. Carpenter*, 1 Bro. C. C. 270, *n.*; *Chapman v. Chapman*, 13 Beav. 308; 20 L. J. C. 465; *Lucas v. Dorrien*, 7 Taunt. 278; *Ashton v. Dalton*, 2 Coll. 565.



mortgage constitutes an equitable charge for the money advanced, until a legal mortgage is executed, unless it be made to appear that no charge was intended to be created until the deed was executed (*y*). Where a legal mortgage has been executed, a charge for further advances cannot be created without writing (*z*); but if an equitable mortgage by deposit be first created, whether accompanied by writing or not, it may be extended, by a subsequent verbal agreement, to future advances, or it may be limited to an actual or past advance (*a*). Evidence contradicting the terms of a written agreement accompanying a deposit of title deeds is inadmissible (*b*). To establish the equitable title to an original mortgage there must be an actual deposit of the deeds, failing which the provisions of the Statute of Frauds requiring evidence in writing must be observed (*c*). It is doubtful if an advance upon a promise to deposit deeds will be a sufficient act of part performance to exclude the Statute of Frauds (*d*). It is not necessary that all the deeds relating to the depositor's title should be handed over to the mortgagee, but an equitable mortgage by deposit will be created if the deeds actually deposited are material documents (*e*). In the case of land registered under the Land Transfer Acts, 1875 and 1897, the deposit of the land certificate, office copy of the registered charge, or certificate of charge creates an equitable title in the holder (*f*).

The remedy of an equitable mortgagee by deposit of deeds is *primâ facie* by foreclosure upon the usual terms, with a conveyance at the expense of the mortgagor; and not by sale (*g*). The remedy for a mere equitable charge on land, without deposit, is *primâ facie* by sale (*h*).

Remedy of equitable mortgagee, by foreclosure.

(*y*) *Edge v. Worthington*, 1 Cox, 211; *Ex p. Butler*, 2 Cox, 243; *Hockley v. Bantock*, 1 Russ. 141; *Krys v. Williams*, 3 Y. & C. Ex. 55; 7 L. J. Ex. Eq. 59; *Lloyd v. Attwood*, 3 De G. & J. 614; 29 L. J. C. 97.

(*z*) *Ex p. Hooper*, 19 Ves. 477; 1 Mer. 7.

(*a*) *Ex p. Mountford*, 14 Ves. 606; *Ex p. Langston*, 17 Ves. 227; *Ex p. Kensington*, 2 Ves. & B. 79; *Mountford v. Scott*, T. & R. 274; *Ede v. Knowles*, 2 Y. & C. C. 172.

(*b*) *Ex p. Coombes*, 17 Ves. 369. See *Barton v. Gray*, L. R. 8 Ch. 932; 43 L. J. C. 229; *Cairns, L. J., Shaw v. Foster*, L. R. 5 H. L. 321.

(*c*) *Ex p. Philpott*, 12 Price, 197; *Fenwick v. Potts*, 8 De G. M. & G. 506; *Ex p. Broderick*, 18 Q. B. D. 766; 56 L. J. Q. B. 635; *Jared v. Clements*, [1903] 1 Ch. 428; 72 L. J. C. 291. See

*Ex p. Coombe*, 4 Madd. 249.

(*d*) See *Kebell v. Philpott*, 7 L. J. C. 237; *Selborne, L. C., Maddison v. Alderson*, 8 App. Cas. 467; 52 L. J. Q. B. 737.

(*e*) *Goodwin v. Waghorn*, 4 L. J. C. 172; *Lacon v. Allen*, 3 Drew. 579; 26 L. J. C. 579. See *Dixon v. Muckleston*, L. R. 8 Ch. 155; 42 L. J. C. 210.

(*f*) 38 & 39 Vict. c. 87, s. 81; 60 & 61 Vict. c. 65, s. 22, sub-s. 6 (f).

(*g*) *James v. James*, L. R. 16 Eq. 153; 42 L. J. C. 386; *Pryce v. Bury*, L. R. 16 Eq. 153, in note; *Backhouse v. Charlton*, 8 Ch. D. 444; *Lees v. Fisher*, 23 Ch. D. 283. In a suit for foreclosure the court may order a sale. See *ante*, p. 206.

(*h*) *Tennant v. Trenchard*, L. R. 4 Ch. 537; 38 L. J. C. 169; *Iv. Owen*, [1894] 3 Ch. 220; 63 L. J. C. 749. See *Carter v. Wake*, 4 Ch. D. 605; 46 L. J. C. 841.

Specific performance of agreement to give mortgage, etc.

If the deposit be accompanied by an agreement to give a legal mortgage with usual powers, it will be specifically enforced according to its terms; and the court will decree specific performance of an agreement to execute a mortgage with an absolute and immediate power of sale (*i*). And where it appears to have been the intention that a formal deed should not be executed, the deposittee will only be entitled to have a memorandum signed stating the purpose of the deposit (*k*). And, if necessary, the court will restrain the mortgagor from parting with the legal estate in the premises equitably charged (*l*).

Equitable mortgagee not compellable to take the legal estate.

On the other hand, an equitable mortgagee by deposit cannot be compelled to accept a legal mortgage whereby he might incur liability as tenant of the legal estate; as by the assignment of a lease subject to rent and covenants; nor does he by taking a deposit of the lease as security incur any liability under it to the lessor, nor although he may have entered into possession of the land; the relation of landlord and tenant being purely legal and not equitable (*m*).

Equitable mortgage by agreement without deposit, must be proved by writing.

An agreement in writing to execute a mortgage, or an agreement in writing to deposit deeds as security for a debt, without actual deposit, gives the right in equity to specific performance, and so creates an equitable mortgage. But a mere agreement for a mortgage or for a deposit, without actual deposit, must be proved by writing signed by the party to be charged therewith, under the Statute of Frauds (*n*).

Mortgage of copyholds.

The above doctrines concerning mortgages have been stated generally with reference to freehold estates; but they are applicable for the most part to mortgages of any other subjects of property; though the form of the mortgage must necessarily vary in some degree according to the subject, whether freehold, copyhold or leasehold, or a merely equitable estate or interest.

A mortgage of copyholds usually takes the form of a conditional surrender. A surrender is made to the use of the mortgagee, but subject to the condition that on payment of principal and

(*i*) *Matthews v. Goodday*, 31 L. J. C. 282; *Hermann v. Hodges*, L. R. 16 Eq. 18; *York Union Bkg. Co. v. Artley*, 11 Ch. D. 205.

(*k*) *Sporle v. Whayman*, 20 Beav. 607; 24 L. J. C. 789.

(*l*) *London and County Bank v. Lewis*, 21 Ch. D. 490.

(*m*) *Moore v. Choat*, 8 Sim. 508; *Moore v. Greg*, 2 De G. & S. 304; 2 Ph. 717. See *Cox v. Bishop*, 8 D. M. & G.

815; 26 L. J. C. 389.

(*n*) *Tebb v. Hodge*, L. R. 5 C. P. 73; *Ex p. Broderick*, 18 Q. B. D. 766; 56 L. J. Q. B. 635; cp. *Ex p. Coombe*, 4 Madd. 249. As to priority between an equitable mortgage without the deeds and an equitable mortgage with deposit of deeds, see *Dixon v. Muckleston*, L. R. 8 Ch. 155; 42 L. J. C. 210. And see *post*, Chap. II. Sect. VI., p. 347.

interest on a certain day the surrender shall be void. The mortgagee does not take admittance, except upon foreclosure, and therefore incurs no fine or liability for the rents and services. Upon redemption, satisfaction of the condition is entered upon the rolls and the surrender is thereby vacated, leaving the mortgagor in admittance as before. A separate deed of mortgage is executed covenanting to surrender as above, and in other respects in the form of a usual mortgage deed adapted to the copyhold security (o).

An equitable mortgage of copyholds may be made by deposit of the copies of the Court Rolls relating to the title (p). Equitable mortgage of copyholds.

A mortgage of leaseholds may be made by an assignment of the whole term and interest of the mortgagor, subject to the proviso for redemption and other conditions of a mortgage, in strict analogy with a mortgage in fee simple.—Or it may be made in the form of an underlease by the mortgagor to the mortgagee for a period less than the whole term; in which form the mortgagee avoids incurring the liability, as assignee of the lease, for the rent and covenants contained in it (q). Mortgage of leaseholds.

A mortgage of equitable estates and interests in land is commonly effected by conveyance or assignment in the form applicable to the analogous legal estate or interest, and with the same terms and conditions as a legal mortgage, so far as the same are applicable (r).—An equitable interest created by a contract may be mortgaged by a deposit of the contract, in analogy with a mortgage by deposit of title deeds, as by deposit of a contract for the purchase of an estate or for a lease; and such mortgage is subject to the same rules and incidents as an equitable mortgage by deposit of deeds (s). Mortgage of equitable estates and interests.

With respect to assignments of equitable interests, it is to be observed, that if the subject of property be of the nature of personal chattels, passing by transfer of possession, it is necessary to do what is tantamount to obtaining possession, that is, to give notice of the assignment to the trustee and thus convert him into a trustee for the assignee, in order to perfect the assignment as against unknown or subsequent claimants, who by giving a prior notice might obtain priority. Such is the case with an assignment or mortgage of money charged upon Notice of mortgage to the trustee.

(o) Elton on Cop. 67, 79; 1 Prideaux, 153, n. Conv. 525.

(p) *Ex p. Warner*, 19 Ves. 202; *Whitbread v. Jordan*, 1 Y. & C. Ex. 303; 4 L. J. Ex. Eq. 48; see *Pryce v. Bury*, 23 L. J. C. 676; L. R. 16 Eq.

(q) 1 Prideaux, Conv. 526.

(r) See *ante*, p. 109.

(s) *Goodwin v. Waghorn*, 4 L. J. N. S. C. 172. See *Unity Banking Assee. v. King*, 25 Beav. 72; 27 L. J. C. 585.

land, or the proceeds of land under trust for conversion, which interests are of the nature of personalty; notice must be given to the trustee in order to perfect the title as against other claimants (*t*).

Notice not necessary with equitable estate in the land.

But if the subject of assignment be an equitable estate or interest in the land itself, corresponding with a legal estate or interest, though the legal estate be outstanding, no notice is necessary to be given to the trustee or legal owner in order to complete the assignment, for assignments of such equitable estates, in analogy with legal conveyances, take priority according to the time of execution. Thus, with the equity of redemption of a mortgage in fee, a subsequent mortgagee obtains no priority over an intermediate one, by giving notice to the legal mortgagee; but the mortgagees, in the absence of special circumstances, rank in order of time (*u*).

#### § 5. EQUITABLE ESTATES AND INTERESTS ARISING OUT OF CONTRACTS OF SALE.

Vendor trustee for specific performance—equitable estate of purchaser.

Lien of vendor for unpaid purchase money—discharge of lien by taking other security.

Lien of purchaser for deposit—claim to return of deposit.

Conversion of the land by contract of sale—depends upon liability of vendor to specific performance—devise of land contracted to be sold—effect of compulsory sale.

Conversion of the purchase money by the contract—depends upon liability of purchaser to specific performance—purchase money primarily charged upon the land purchased under Locke King's Act.

Vendor becomes trustee for specific performance.

A contract of sale, of which a court of equity would decree specific performance, gives rise to various equities. The vendor from the time of executing the contract holds the land upon trust *sub modo* for the performance of it according to its terms and conditions, but although compellable to assign the estate according to the directions of the purchaser, is not so bound at the suit of a stranger not privy to the contract (*a*); and the

(*t*) *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1; *Foster v. Cockerell*, 3 Cl. & F. 456; *Re Hughes' Trusts*, 2 H. & M. 89; 33 L. J. C. 725; *Lee v. Howlett*, 2 K. & J. 531. See *Arden v. Arden*, 29 Ch. D. 702; 54 L. J. C. 655; *Hopkins v. Hemsworth*, [1898] 2 Ch. 347; 67 L. J. C. 526.

(*u*) *Jones v. Jones*, 8 Sim. 633; *Wilmut*

*v. Pike*, 5 Hare, 14; *Wiltshire v. Rabbits*, 14 Sim. 76; *Taylor v. London and County Bank*, [1901] 2 Ch. 231; 70 L. J. C. 477. See *post*, Chap. II. Sect. VI., p. 350.

(*a*) See *McCreight v. Foster*, L. R. 5 Ch. 604; on appeal *nom. Shaw v. Foster*, L. R. 5 H. L. 321, and cases there cited; *Lysaght v. Edwards*, 2

vendor may be restrained at the suit of the purchaser from selling or conveying the land to another (*b*). And, so long as the vendor remains in possession, he is bound to prevent deterioration of the property, and to keep the same let, and may be charged with an occupation rent (*c*). Any person taking a conveyance from the vendor with notice of the contract would be bound by the same equity or trust for performance as the vendor (*d*).

Equity regards the property under contract for sale as if the contract were carried out according to its terms. Land which ought to have been conveyed is regarded as the property of the purchaser; who may thus acquire the equitable estate in fee simple or other interest contracted for by virtue of the contract without any technical limitation (*e*). As proprietor in equity of the property, the purchaser must bear the result of any accidental deterioration or destruction of the property accruing after the date of a binding contract (*f*), as damage caused by fire (*g*), or the death of the tenant for life where the purchase is of a life interest (*h*); but the destruction of the title deeds subsequently to the contract for sale rests on a different footing, and is only material so far as other evidence of title is not forthcoming (*i*).

Equitable estate of purchaser.

If the purchase money or any part of it remains unpaid after conveyance, the vendor has an equitable lien or charge upon the land conveyed for the amount, and the purchaser holds the land subject to such lien; unless it be excluded by the contract (*k*), or be waived (*l*).

Lien of vendor for unpaid purchase money.

The lien for unpaid purchase money, under the general rule, may be discharged by the vendor taking other security, at the

Discharge of lien by taking other security.

Ch. D. 499; 45 L. J. C. 554; *Elmington (Earl) v. Smith*, 6 Ch. D. 469; 46 L. J. C. 356. And see *Holroyd v. Marshall*, 10 H. L. C. 191; 33 L. J. C. 193; where the same principle was extended to after-acquired property.

(*b*) *Spiller v. Spiller*, 3 Swanst. 556. See *Hadley v. London Bank of Scotland*, 3 De G. J. & S. 63.

(*c*) *Phillips v. Silvester*, L. R. 8 Ch. 173; 42 L. J. C. 225; *Elmington (Earl) v. Smith*, 6 Ch. D. 469; 46 L. J. C. 356; *Royal Bristol Perm. Bg. Soc. v. Bomash*, 35 Ch. D. 390; *Clarke v. Ramuz*, [1891] 2 Q. B. 456; 60 L. J. Q. B. 679; *Jones v. Gardiner*, [1902] 1 Ch. 191; 71 L. J. C. 93; *Plews v. Samuel*, [1904] 1 Ch. 464; 73 L. J. C. 279.

(*d*) *Ferrars v. Cherry*, 2 Vern. 383; *Field v. Boland*, 1 Dr. & Wal. 37; *Potter v. Sanders*, 6 Hare, 1; *Barnes*

*v. Wood*, L. R. 8 Eq. 424; 38 L. J. C. 683.

(*e*) *Bower v. Cooper*, 2 Hare, 408; *Hughes v. Parker*, 8 M. & W. 244; 10 L. J. Ex. 297; *Barnes v. Wood*, 38 L. J. C. 683; L. R. 8 Eq. 424. See *ante*, pp. 120, 182.

(*f*) *See p. Minor*, 11 Ves. 559; *Hodder v. Ruffin*, Tambl. 343; *Holroyd v. Wyatt*, 2 Coll. 327.

(*g*) *Paine v. Moller*, 6 Ves. 349; *Rayner v. Preston*, 18 Ch. D. 1; 50 L. J. C. 472.

(*h*) *Kenny v. Wexham*, 6 Madd. 355; *Strickland v. Turner*, 7 Ex. 208; 22 L. J. Ex. 115.

(*i*) *Bryant v. Bush*, 4 Russ. 1.

(*k*) *Mackreth v. Symmons*, 15 Ves. 329; 2 Wh. & T. L. C. 926.

(*l*) *Kettlewell v. Watson*, 26 Ch. D. 501; 53 L. J. C. 717.

time of the purchase or afterwards, in substitution for it; but it depends upon the circumstance of each case whether the court is to infer that the lien was intended to be reserved, and the lien is not necessarily lost by the vendor merely taking a bond or note or a real security for the purchase money; or by his taking a security for payment at a future day (*m*).

Payment by annuities.

Where the consideration for the sale is to be paid in the form of an annuity for life or lives, though the lien is not necessarily excluded, yet the presumption is against any intention to create a permanent charge on the estate for the periodical payments during the continuance of the annuity; and the vendor is presumptively entitled only to the bond, covenant, or security for the annuity as provided in the contract (*n*).

Lien under compulsory sale.

The lien extends to lands taken by a railway company under the compulsory powers of purchase given by the Lands Clauses Act;—and the deposit required to be made and the bond to be given under the Act, as security for the purchase money of the land taken, does not discharge the lien of the vendor (*o*).

Lien against subpurchaser with notice.

The lien for unpaid purchase money charges the land, not only as against the purchaser himself, but also as against a subsequent purchaser from him, except a purchaser for value of the legal estate without notice that the money was unpaid (*p*).

Lien of purchaser for deposit.

Upon the like principle, upon payment of a deposit or purchase money before conveyance, the purchaser *primâ facie* acquires a lien for the amount upon the land in the hands of the vendor, in the event of the contract being subsequently rescinded, or failing without any default on his part (*q*). The claim to a return of the deposit stipulated to be paid by the contract of sale may be expressly provided for in certain events by the terms of the contract; and it may be forfeited if the contract so provide (*r*). Where the contract is rescinded by agreement, the claim to the deposit must be referred to the terms of that agreement; and failing agreement, the purchaser is

Claim to return of deposit.

(*m*) *Mackreth v. Symmons*, 15 Ves. 329; *Grant v. Mills*, 2 V. & B. 307; *Cood v. Pollard*, 10 Price, 109; *Winter v. Anson (Lord)*, 3 Russ. 488.

(*n*) *Dixon v. Gayfere*, 1 De G. & J. 655; 27 L. J. C. 148.

(*o*) *Munn v. Isle of Wight Ry.*, L. R. 5 Ch. 414; 39 L. J. C. 522; *Allgood v. Merrybent and Dartington Ry.*, 33 Ch. D. 571; 55 L. J. C. 743.

(*p*) *Mackreth v. Symmons*, 15 Ves. 329; 2 Wh. & T. L. C. 926; *Frail v. Ellis*, 16 Beav. 350; 22 L. J. C. 467; *Dryden v. Frost*, 3 M. & Cr. 670; 8

L. J. C. 235.

(*q*) *Rose v. Watson*, 10 H. L. C. 672; *Whitbread & Co. v. Watt*, [1902] 1 Ch. 835; 71 L. J. C. 424. See *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. App. 101, where it was held that a sub-purchaser might establish a lien for purchase money advanced to the extent of the lien of the original purchaser.

(*r*) *Palmer v. Temple*, 9 A. & E. 508; *Hindon v. Sparkes*, L. R. 3 C. P. 161; 37 L. J. C. P. 81; *Essex v. Daniel*, L. R. 10 C. P. 538.

presumptively entitled to a return of his deposit unless he is in default (s).

Where a contract is rescinded by the court it is within the jurisdiction of the court to order the deposit to be returned, and to declare it to be a lien upon the land, with interest (t). On a sale made by order of the court, which failed by reason of the bankruptcy of the purchaser and the refusal of his assignees to complete, an order was made by the court declaring the deposit to be forfeited, although the conditions of sale contained no provision as to forfeiture (u).

Jurisdiction of Court to order return of deposit.

The lien charges the land as against a subsequent purchaser or mortgagee from the vendor having notice of the payments made (x).

Lien as against purchaser with notice.

A contract of sale of which a court of equity would decree specific performance further operates in equity as a conversion, according to the terms of the contract, of the land into money on the part of the vendor, and of the amount of purchase money into the land on the part of the purchaser (y).

Conversion by contract of sale.

If the vendor die before completion, his personal representative may enforce the contract in an action for specific performance against the purchaser; in which suit the real representative must be joined, and may be compelled to execute a conveyance (z).

Of the land into money.

The conversion depends upon the contract. If the contract is such as a court of equity would decree to be specifically performed against the vendor at the time of his death, the conversion is then absolute as between his real and personal representatives. And it is immaterial that afterwards the contract is not in fact completed—as where the purchaser subsequently lost his right to specific performance by delay (a).

Conversion absolute at death of vendor.

If at the time of the death of the vendor the contract is in terms future or conditional as to completion, the conversion is not absolute until the time has elapsed or the condition has

Future and conditional conversion.

(s) *Gosbell v. Archer*, 2 A. & E. 500; *Hove v. Smith*, 27 Ch. D. 89; *Soper v. Arnold*, 14 App. Cas. 429; *Smith v. Butler*, [1900] 1 Q. B. 694; 69 L. J. Q. B. 521.

(t) *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 101; *Torrance v. Bolton*, L. R. 8 Ch. 118; *Re Hargreaves and Thompson*, 32 Ch. D. 454. As to the claim for interest, see *ante*, p. 196.

(u) *Depree v. Bedborough*, 4 Giff. 479; 33 L. J. C. 134.

(x) *Rose v. Watson*, 10 H. L. C. 672; see *ante*, pp. 111, 222.

(y) *Fletcher v. Ashburner*, 1 Bro. C. C. 497; 1 Wh. & T. L. C. 327.

(z) *Farrar v. Winterton (Earl)*, 5 Beav. 1; *Roberts v. Marchant*, 1 Phill. 370; *Hoddel v. Pugh*, 33 Beav. 489; *Att.-Gen. v. Brunning*, 8 H. L. C. 243; 30 L. J. C. 379; *Re Clowes*, [1893] 1 Ch. 214.

(a) *Curre v. Bowyer*, 5 Beav. 6, n.; *Hardey v. Hawkshaw*, 12 Beav. 552.

been fulfilled (*b*). A uniform series of decisions extending over upwards of a century had established that where an option to purchase real estate was given by a contract, and not exercised until after the death of the giver of the option, the property was thereupon converted as between the real and personal representatives of the original freeholder (*c*); but it has now been held that this is not a right which runs with the land, and it is difficult to see how the earlier decisions can now be supported on the ground of adoption of the contract or otherwise (*d*).

No conversion unless specific performance can be enforced.

If a court of equity would not enforce specifically the performance of the contract there is no conversion, and the heir or devisee of the vendor may retain the land (*e*). But in the case of a parol contract a conversion may be effected if the real representative adopts the contract, for the Statute of Frauds (29 Car. II. c. 3) does not affect the validity of the contract (*f*).

Devise of land revoked by contract of sale.

Accordingly, a devise of the land is revoked, as to the beneficial interest by a subsequent contract to sell it, though not completed at the testator's death; and the devise will not apply to the purchase money, or to the lien of the vendor upon the land which is merely a security for the purchase money (*g*). If the contract is conditional upon an option in the purchaser, the devise takes effect only until the exercise of the option, and is then revoked in favour of the personal representative, unless provision is made by the will that the devisee is to have the proceeds of sale (*h*).

Devise of land under contract for sale.

A devise of land, after a contract of sale made which is not completed at the testator's death, operates, like a devise of land of which the testator is only trustee, in conveying the legal estate only, unless the intention to pass the purchase money by it appear in the will (*i*).

Conversion by compulsory sale.

A statutory notice by a company to take lands under their compulsory powers of purchase has not alone the effect of a contract of sale by way of equitable conversion (*j*); but when

(*b*) *Gaskarth v. Lowther* (Lord), 12 Ves. 107.

(*c*) *Laoes v. Bennett*, 1 Cox, 167; *Re Isaacs*, [1894] 3 Ch. 506; 63 L. J. C. 815.

(*d*) *Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L. J. C. 555.

(*e*) *Re Thomas*, 34 Ch. D. 166; 56 L. J. C. 9. See *Roberts v. Marchant*, 1 Hare, 547; 1 Phill. 370.

(*f*) *Frayne v. Taylor*, 33 L. J. C. 228; *Re Harrison*, 34 Ch. D. 214; 56 L. J. C. 341.

(*g*) *Tebbutt v. Vales*, 6 Sim. 40;

*Moor v. Raisbeck*, 12 Sim. 123; *Farrar v. Winterton* (Earl), 1 Beav. 1; *Re Clowes*, [1893] 1 Ch. 214.

(*h*) *Weeding v. Weeding*, 1 J. & H. 424; 30 L. J. C. 680; *Re Pyle*, [1895] 1 Ch. 724; 64 L. J. C. 477. See *Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L. J. C. 555.

(*i*) *Wall v. Bright*, 1 J. & W. 494; *Drant v. Vause*, 1 Y. & C. C. 580; *Enuss v. Smith*, 2 De G. & S. 722. See *Lysaght v. Edwards*, 2 Ch. D. 499.

(*j*) *Haynes v. Haynes*, 1 Dr. & Sm. 426; 30 L. J. C. 578.



followed by a contract settling the price and terms of sale, the conversion in equity is complete from the date appointed for the completion of the sale (*k*).

The contract operates on the part of the purchaser as a conversion of his personal estate to the amount of the purchase money into the land, according to the terms of the contract; and if he die before completion his heir or devisee becomes entitled to have the purchase completed as against the personal representative, and was formerly entitled to have the purchase money paid out of the personal estate (*l*).

Conversion of the purchase money into the land.

The conversion in favour of the heir or devisee depends upon whether the contract is such as a court of equity would specifically enforce against the purchaser (*m*). And where a purchaser has an option to complete, which he has not exercised before his death, his real representative takes nothing (*n*).

Depends upon the liability of the purchaser to specific performance.

By the Real Estate Charges Acts, 1867 and 1877, any lien for unpaid purchase money upon any lands or hereditaments must be discharged by the heir or devisee, unless the testator shall have signified a contrary or other intention (*o*).

Purchase money charged primarily upon land purchased by a testator.

(*k*) *Ex p. Hawkins*, 13 Sim. 569; *Re Manchester and Southport Ry.*, 19 Beav. 365; *Re Lowry's Will*, L. R. 15 Eq. 78; 42 L. J. C. 509; *Watts v. Watts*, L. R. 17 Eq. 217; 43 L. J. C. 77.

*v. Acton*, 28 Beav. 333; *Hudson v. Cook*, L. R. 13 Eq. 417; 41 L. J. C. 306; *Re Harrison*, 34 Ch. D. 214; 56 L. J. C. 341.

(*l*) *Green v. Smith*, 1 Atk. 572.

(*n*) *Radnor (Earl) v. Shafto*, 11 Ves. 448.

(*m*) *Broome v. Monk*, 10 Ves. 597; *Collier v. Jenkins*, Young, 295; *Garnett*

(*o*) *Re Cockcroft*, 24 Ch. D. 94; 52 L. J. C. 811. See *ante*, p. 210.

## CHAPTER II.

## THE LIMITATION OF FUTURE ESTATES.

- Section I. The limitation of future estates at common law.
- II. Future Uses.
- III. Future Devises.
- IV. Powers.
- V. The Rules against Perpetuities and Accumulations.
- VI. Future Equitable Estates and Interests.

The present chapter treats of the limitation of estates in regard to the time of commencement, that is to say, as commencing at a future time, whether as regards the coming into possession or the vesting in interest (*a*).

The limitations of future estates may be distinguished primarily according to the sources of the law to which they are to be referred:—at the common law, by way of *reversion* and *remainder*;—under the Statute of Uses, admitting, besides the future limitations of the common law, *springing* or *shifting uses*;—and in wills, admitting *executory devises*;—these form respectively the subjects of the first three sections of this chapter.

*Powers* may also be distinguished as a special mode in which future estates, whether by way of use or under wills, may be limited and created; they are treated separately in the fourth section.

*The Rule against perpetuities* by which the limitation of future estates is restricted forms the subject of the fifth section; together with the law restricting the accumulation of rents and profits.

There will then remain to be treated in the sixth and last section the doctrines of equity by which *future equitable estates* and interests, whether created by express declaration or constructive trusts, are regulated and ranked in order of priority.

(*a*) See *ante*, pp. 5, 117.

SECTION I. THE LIMITATION OF FUTURE ESTATES AT  
COMMON LAW.

- § 1. Reversions.
- § 2. Remainders.
- § 3. Contingent remainders.
- § 4. Rule in Shelley's case.

§ 1. REVERSIONS.

Rule that freehold cannot be limited *in futuro*—reversion and remainders of freehold.

Reversion in fee upon creation of particular estate—limitation of reversion to the grantor or his heirs void at common law—creates title by purchase under statute 3 & 4 Will. IV. c. 106.

Reversion in particular estate upon creation of less estate—in estate tail—in estate for life—in term of years upon underlease.

Tenure of particular estate to reversion.

It was a principle of the common law that the seisin or freehold could never be put in abeyance; that there must always be a present tenant to answer to the requirements of tenure. Whence the rule that an estate of freehold cannot be limited to commence at a future time (*b*).

Estate of freehold cannot be limited to commence *in futuro*.

But the freehold may be distributed into a particular estate and reversion or remainders; and the reversion or remainders, though vested in interest, are deferred or future estates in regard to the possession. Moreover, a remainder may be limited upon a contingency so as to defer also the vesting until the determination of the particular estate, consistently with the rule that the freehold shall not be in abeyance, as the tenancy is full during the continuance of the particular estate (*c*). Reversions and Remainders, vested and contingent, as the future estates admissible at common law, form the subject of this section, and as supplementary to the treatment of remainders, the doctrines of limitation embodied in and connected with the rule in *Shelley's* case, have to be considered. Accordingly, these matters form the subjects of the several sub-sections.

Reversion and remainder of freehold.

Contingent remainder.

It may here be observed that leases and limitations of terms of years, which deal with the possession only and not with the freehold interest, may be made to commence in possession at a future

Lease may be made for term of years to commence *in futuro*.

(*b*) *Buckler's Case*, 2 Co. 55 *a*; Co. Lit. 217 *a*. See *ante*, p. 33. (*c*) See *ante*, p. 33.

time, giving merely an *interesse termini* or right to have the possession when the time arrives, but no estate in the land (*d*).

Future uses of copyholds.

Also, the limitations of estates of copyhold or customary tenure are independent of the freehold; for the freehold remains vested in the lord. Hence under that tenure future estates, though freehold as to quantity, may be limited to arise independently of any preceding estate; and if a surrender be made to such future uses, the lord is bound to admit the surrenderee when the use becomes vested in interest (*e*).

Reversion in fee upon creation of particular estate.

If tenant in fee simple convey the land to a person for a particular estate only, as for an estate tail, or for term of life, or of years, there remains in him and his heirs an estate expectant, as to the possession, upon the determination of the particular estate. This estate is called *the reversion*, because the land then reverts or returns in possession to him or to his heirs (*f*).

Express limitation of reversion.

An express limitation of the reversion to the grantor or to his heirs was void of effect at common law; for it merely stated the legal result of the creation of the particular estate out of his original estate, leaving the residue or reversion in him by the same title as before (*g*).

Makes the grantor a purchaser by statute.

But by the Inheritance Act, 1833 (3 & 4 Will. IV. c. 106), s. 3, under a limitation by any assurance (executed after 31st December, 1833,) to the person or to the heirs of the person who shall thereby have conveyed the same land, "such person shall be considered to have acquired the land as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof" (*h*).

It may be observed that if the effect of the statute were to convert the reversion into a remainder by force of the limitation for all purposes, the tenure of the particular estate to the reversioner would be destroyed, and the incidents of the reversion, such as rent and services, would be lost (*i*).

Reversion in particular estate.  
Estate tail.

In like manner, if the tenant of a particular estate convey the land for a less estate, he has a reversion left in himself;—thus tenant in tail, by a disentailing assurance, may dispose of the lands entailed in fee simple or for any less estate; and if he make a disposition for a less estate, the reversion remains in him

(*d*) *Doe v. Walker*, 5 B. & C. 111; *Doe v. Day*, 2 Q. B. 147; 12 L. J. Q. B. 86; *Lewis v. Baker*, [1905] 1 Ch. 46; 74 L. J. C. 39.

(*e*) See *ante*, p. 63.

(*f*) Co. Lit. 22 b, 142 b, 183 b.

(*g*) *Bingham's Case*, 2 Co. 91 a. See *ante*, p. 36.

(*h*) *Carson*, Real Prop. Stats. 374, 379.

(*i*) See *ante*, p. 29.

and is subject to the entail, unless it be wholly barred by the same assurance (*k*). If tenant in tail lease for life or for years at common law, without a disentailing assurance or any other special or statutory power in that behalf, he has a reversion; but such lease is valid only during his life and is voidable at his death by the heir in tail (*l*).

So, tenant for life may make a lease for years, and, however long the term of years may be, as it is not coextensive with the freehold, there is a reversion in the lessor (*m*). But such lease, unless made under a special or statutory power, is valid only during the continuance of the lessor's estate, and is avoided by his death (*n*).

Estate for life.

If tenant for term of years make an underlease for a shorter term, by however small an interval of time, he has the reversion for that interval left in him (*o*). An underlease for a shorter term, "if the underlessee shall so long live," leaves a reversion expectant on the determination of the sub-term either by lapse of time or by the death of the underlessee (*p*).—An underlease for the whole term, or for a greater estate, operates as an assignment and leaves no reversion; it carries with it all the rights and liabilities incident to the term and leaves none of the incidents of a reversion (*q*).

Reversion in term of years upon underlease.

The grant of a particular estate, leaving a reversion in the grantor, creates a tenure between the tenant of the particular estate and the reversioner. This tenure is not within the statute of *Quia emptores*, for that statute extends only to alienations in fee simple, preventing any new tenure arising upon such alienations. Hence rent reserved upon such a grant of a particular estate is of the nature of rent service, and is attended at common law with the remedy of distress (*r*). And a grant of the reversion impliedly carries with it all the incidents of the tenure, as the rent service, if any, unless there be an express exception of such incidents in the grant (*s*).

Tenure of particular estate to reversion.

Rent service.

Grant of reversion carries the incidents of tenure.

(*k*) 3 & 4 Will. IV. c. 74, ss. 15, 21. See Carson, Real Prop. Stats. 274, 282.

(*l*) Co. Lit. 45 *b*, 46 *b*; Lit. s. 606. See *ante*, p. 145.

(*m*) *Derby (Earl) v. Taylor*, 1 East, 502; Co. Lit. 46 *a*.

(*n*) *Doe v. Watts*, 7 T. R. 83; *Smith v. Widdlake*, 3 C. P. D. 10; 47 L. J. C. P. 282. See *Ludford v. Barber*, 1 T. R. 90.

(*o*) *Holford v. Hatch*, Dougl. 183; *South of England Dairies v. Baker*,

[1905] 2 Ch. 631; 76 L. J. C. 78.

(*p*) *Wright v. Cartwright*, 1 Burr. 282; Co. Lit. 45 *b*.

(*q*) *Parmenter v. Webber*, 8 Taunt. 593; *Wollaston v. Hakewill*, 3 Man. & G. 297; *Beardman v. Wilson*, L. R. 4 C. P. 57; *Lewis v. Baker*, [1905] 1 Ch. 46; 74 L. J. C. 39. See *Butt's Case*, 7 Co. 23 *a*; *Read v. Errington*, Cro. El. at p. 322.

(*r*) Co. Lit. 22 *a*, 142 *b et seq*.

(*s*) Co. Lit. 151 *b*.

## § 2. REMAINDERS.

Remainder—must follow immediately on the particular estate—must wait the determination of the particular estate—must be created at same time with the particular estate.

Remainder cannot be limited after fee simple—remainder after fee tail—after base fee—after lease for years.

Remainders in particular estates—terms of years.

Tenure of particular estate and remainder.

Remainder. If tenant in fee simple convey a particular estate in the land to one person, and at the same time another estate, to commence in possession immediately upon the expiration of the particular estate, to another person, the latter estate is called, relatively to the prior particular estate, a remainder (*a*). Thus, if tenant in fee simple grant to A. for life, and after the determination of that estate to B. for life, the estate of B. is a remainder relatively to the estate of A. So, if the grant be made to A. for life, and after the determination of that estate to B. and to his heirs, B. has a remainder in fee. In the former example there is a reversion in fee in the grantor; in the latter the whole fee is disposed of and there is no reversion.—In like manner, several remainders may be created successively in the same land, either leaving a reversion or with an ultimate remainder in fee.

Successive remainders.

Remainder must follow immediately on particular estate.

If a grant be made to A. for life, and after the lapse of a day after his death to B. for life or in fee, the limitation to B. is not a remainder, because it does not commence in possession immediately on the determination of the particular estate; it is a limitation of a freehold estate to commence *in futuro*, which in a common law conveyance is void, and the reversion of A.'s estate remains in the grantor (*b*).

Remainder must wait the determination of particular estate.

Also a limitation which is to take effect in defeasance of a preceding estate, without waiting for the regular determination of that estate according to the terms of its limitation, is not a remainder; and such a limitation is void at common law (*c*). But the preceding particular estate may be made determinable by a conditional limitation, and the estate limited to take effect in possession immediately upon its determination, whether that

(*a*) Co. Lit. 49 *a*, 143 *a*. See *ante*, p. 28.

(*b*) Co. Lit. 378 *a*; Fearne, Cont. Rem. 307. As to such limitations of uses and in wills, see Fearne, Ex. Dev.

398, and *post*, pp. 252, 257.

(*c*) Fearne, Cont. Rem. 261, 274; though it may be effectually made by way of shifting use or executory devise. See *post*, pp. 253, 261.

happen under the conditional limitation or by the expiration of the full term of limitation, is a remainder (*d*).

The particular estate and the remainder must be created at the same time by one conveyance or instrument; for if the particular estate be first created, leaving the reversion in the grantor, any subsequent disposition can be effected only by grant or assignment of the reversion; which is not thereby changed into a remainder, but still retains its character of a reversion, to which the tenure of the particular estate is incident (*e*).

Remainder must be created at same time with particular estate.

No remainder can be limited in expectancy upon an estate in fee simple, that being the largest estate allowed by law; nor is any reversion left in the grantor after the grant of such an estate. Upon the death of a tenant in fee simple, without having devised his estate by will, and without leaving heirs, the land passes by *escheat* to the next superior lord (*f*).

Remainder cannot be limited after fee simple.

An estate in fee tail, being a particular estate since the statute *De donis*, admits of limitations in remainder expectant upon its determination (*g*).—An estate tail at common law was a fee simple conditional, and did not admit of any remainder or reversion expectant upon it; and such is the case still with limitations in tail of inheritances not within the statute *De donis*, as with copyholds in manors in which there is no custom of entail (*h*).

Remainder after fee tail.

After fee simple conditional.

If tenant in tail alienate the land by an assurance which is effectual as against the issue in tail, but is not effectual to bar the estates in reversion or remainder, upon the failure of the issue in tail of the original tenant in tail, the reversion or remainder takes effect in possession. A base fee may thus co-exist with a reversion or remainder by matter *ex post facto*, though it cannot be so limited by original grant (*i*).

Remainder after base fee.

If a lease for years be made in possession, and at the same time the freehold be limited, the limitation of the freehold is subject to the term of years, but is not a remainder strictly so called; for the lease for years does not interfere with or affect the limitation of the freehold title. The limitation of the

Remainder after term of years.

(*d*) See *ante*, p. 163.

(*e*) Fearn, Cont. Rem. 302. See *Hole v. Escott*, 4 My. & Cr. 187.

(*f*) *Tilburgh v. Barbut*, 1 Ves. sen. 89; *Ware v. Cann*, 10 B. & C. 433.

(*g*) Co. Lit. 22 *a*. See *Martin v. Strachan*, 5 T. R. 507, *n*.; *Roe v. Baldwre*, 5 T. R. 104.

(*h*) *Stafford (Earl) v. Buckley*, 2 Ves. sen. 170; *Doe v. Simpson*, 3 Man.

& G. 929.

(*i*) *Seymour's Case*, 10 Co. 95 *b*; Tud. L. C. Conv. 158. See *ante*, p. 28. A like result may be produced by a power in a settlement which may be operative over an estate tail, but extinguished as to the remainders. 1 Sanders, Uses, 179. See as to barring the remainders, 37 & 38 Vict. c. 57, s. 6.

freehold takes immediate effect, as regards the seisin or legal possession, though it is commonly described as in remainder as regards the *de facto* possession, which is deferred until the expiration of the term of years (*k*). Hence a limitation subject to a term of years, as it deals with the immediate freehold, cannot be made upon a contingency, but must give a vested estate (*l*).

Remainders  
in particular  
estates.

Term of years  
does not  
admit of  
remainder.

Underlease of  
term.

Executory be-  
quest of term.

Future trusts  
of term.

Tenant of a particular estate of freehold may, in general, convey the land for a less estate with remainder over (*m*).

A term of years, being personal estate, does not admit of limitation, at common law, into a particular estate and remainder (*n*).—If tenant for term of years assign the term to a person for life, it operates as an absolute assignment of the whole term; however long the term may be (*o*).—Tenant for term of years may make an underlease for a less number of years, thereby creating a new term in the underlessee with the reversion of the original term in himself; and he may make a further underlease to another person commencing at the expiration of the prior one (*p*). Where a lease was made to A. for ninety-nine years, if he should so long live, and if he should die within the term, the remainder thereof to B. for the residue of the term, it was construed as a lease to B. for so many of ninety-nine years as should be unexpired at the death of A.; the word *term* being construed, for the purpose of supporting the limitation, to mean the time or number of years mentioned (*q*).

By means of an executory bequest in a will a term may be bequeathed to a person, with a bequest over to another, to take effect upon the death of the former or other specified event; the effect of which is to divest the term primarily vested in the first legatee (*r*).—Also, by vesting the term in a trustee, the trust or equitable estate may be disposed of with the same freedom and according to the same rules of limitation as executory bequests in wills (*s*).

(*k*) See *ante*, pp. 30, 35.

(*l*) See *ante*, p. 35; *post*, p. 236.

(*m*) See *Low v. Burron*, 3 P. Wms. 262; *Derby (Earl) v. Taylor*, 1 East, 502; *Pickersgill v. Grey*, 30 Beav. 354; Co. Lit. 46 *a*.

(*n*) Hargrave's note (5) to Co. Lit. 20 *a*; Fearne, Ex. Dev. by Butler, 402, 567.

(*o*) *Lilley v. Whitney*, Dyer, 272 *a*; Co. Lit. 46 *a*.

(*p*) *Holford v. Hatch*, Dougl. 183; *South of England Dairies v. Baker*, [1966] 2 Ch. 631; 76 L. J. C. 78.

(*q*) *Wright v. Cartwright*, 1 Burr. 282.

(*r*) *Bradshaw v. Skilbeck*, 2 Bing. N. C. 182. And see *post*, p. 260.

(*s*) Hargrave's note (5) to Co. Lit. 20 *a*; Fearne, Cont. Rem. 470; *Massenburgh v. Ash*, 1 Vern. 234, 304.



Upon the grant of a particular estate with remainder or remainders, leaving a reversion in the grantor, the relation of tenure is created between the successive tenants of the particular estate and remainders and the reversioner. But if the ultimate remainder is granted in fee leaving no reversion, no new tenure is created, and the tenants in succession hold of the chief lord by the statute of *Quia emptores* (t). There is no tenure between the tenant of the particular estate and the remainderman; for the one does not derive title from the other, but both from the same source.

Tenure of particular estate and remainder.

### § 3. CONTINGENT REMAINDERS.

Vested remainder—contingent remainder—distinction of contingency as to the person and as to the interest—examples.

Contingent remainder must be supported by a particular estate of freehold.

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Construction of remainders as vested or contingent—words of contingency referred to possession rather than vesting—remainder construed to vest as soon as possible—remainder to class, as children—remainder to children who shall attain twenty-one.

A remainder which is certain as to the owner and absolute as to his estate or interest is a *vested* remainder; the remainderman is presently *invested* with a portion of the seisin or freehold, the whole fee being divided into a particular estate and remainder or remainders (a).

But a remainder may be limited to a person not yet ascertained, or to a certain person upon a condition precedent which may not happen until after the determination of the particular estate; and whilst such uncertainty lasts, as to the person or the interest, it is described as a *contingent* remainder.—A contingent remainder becomes changed into a vested remainder by the owner becoming certain or the condition happening during the continuance of the particular estate (b).

Contingent remainder.

(t) Co. Lit. 142 b *et seq.*

(a) See *ante*, pp. 33, 34, 37.

(b) See *ante*, pp. 37, 161.

According to Fearné,—“A contingent remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate” (c).—And, as he afterwards explains,—“It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable; as the remainderman may die or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent” (d).

Classification  
of contingent  
remainders.

Fearné distinguishes four sorts of contingent remainders which may be shortly exhibited in the following scheme:—Remainders limited, 1. Upon an uncertain event, which also determines the particular estate by conditional limitation;—2. Upon an uncertain event, which does not affect the particular estate;—3. Upon a certain event which may not happen until after the determination of the particular estate;—4. To a person not ascertained or not in being (e).

Reducible  
under one  
head.

But “all contingent remainders appear to be so far reducible under one head, that they depend for their vesting on the happening of an event, which, by possibility, may not happen during the continuance of the preceding estate, or at the instant of its determination” (f).

Distinction  
between con-  
tingency of  
ownership  
and of in-  
terest.

A distinction, however, is to be observed between the uncertainty as to the person in the last sort; and the uncertainty of some event not concerning the person in the first three of the above sorts, which is of practical importance; for remainders of the former kind, which are limited in contingency as to the person are, by the nature of the limitation, inalienable, and, therefore, tend to a perpetuity (g).

Examples.

The various forms of contingent remainders may be conveniently explained or illustrated by some examples:—If land be limited (as is common in settlements) to A. for life, with

(c) Fearné, Cont. Rem. 3.

(d) Fearné, Cont. Rem. 216; *Parkhurst v. Smith*, 6 Bro. P. C. 351; Willes, 327; *Doe v. Scudamore*, 2 Bos. & P. 289. See Campbell, Ruling Cases, Vol. X. pp. 810 *et seq.*

(e) Fearné, Cont. Rem. 5.

(f) Butler's note (g) to Fearné, Cont. Rem. 9.

(g) See *post*, p. 241. The distinction was pointed out by Willes, C. J., *Parkhurst v. Smith*, Willes, 327, at p. 338.

remainder to the first and every other son of A. successively in tail. A. as yet having no son, the remainder is contingent until a son be born to A. in whom the remainder may vest.—So if it be limited to A. for life, with remainder to such children as he shall leave at his decease, the remainder is contingent during the life of A. (*h*).

To A. for life,  
remainder to  
son of A.

To A. for life,  
remainder to  
children  
living at his  
decease.

If land be limited to A. for life, with remainder to the heirs of B., the remainder is contingent during the joint lives of B. and A.; for there can be no heir of B. until his death, which may not happen during the life of A. (*i*).—If the ancestor take an estate of freehold by the same conveyance, the limitation to his heirs is not a contingent remainder to the heir, but is referred to the estate of the ancestor by the rule in *Shelley's* case, to be considered hereafter (*k*).—In the above examples the remainder is limited to a person or persons not ascertained.

To A. for life,  
remainder to  
heir of B.

If land be limited to A. for life, with remainder, if B. survive A., to B. in fee, or in tail, the remainder is made contingent upon the death of A., B. surviving, upon which event the remainder vests in interest and takes effect in possession at the same time (*l*).—If land be limited to A. for life, with remainder upon the death of B. to C., the remainder is contingent upon B. dying in the lifetime of A. (*m*).—So to A. for life and after his death to the children of B., if he leave any him surviving (*n*).

To A. for life,  
remainder if  
B. survive A.,  
to B.

To A. for life,  
remainder  
after death of  
B. to C.

If land be limited to A. for life with remainder, if he die without leaving issue at his death, to B., the remainder is contingent upon that event.—In the case of a devise to A. for life, and upon an indefinite failure of issue of A. to B., A. would formerly have taken an estate tail by implication and B. a vested remainder expectant upon the estate tail (*o*).

To A. for life,  
remainder if  
A. die with-  
out leaving  
issue.

So, if land be limited to A. in tail and if A. die without leaving issue at his death to B., the limitation to B. is a remainder contingent upon the death of A. without leaving issue, an event which at the same time determines the particular estate (*p*). A like limitation over after a limitation to A. in fee

To A. in tail,  
remainder if  
A. die with-  
out leaving  
issue.

(*h*) *Doe v. Perryn*, 3 T. R. 484; *Alexander v. Alexander*, 16 C. B. 59; 24 L. J. C. P. 150; *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. C. 191.

(*i*) *Archer's Case*, Co. 66 b; *Boraston's Case*, 3 Co. 19 a; Tud. L. C. Conv. 427; *Challoner and Bowyer's Case*, 2 Leon. 70; Co. Lit. 378 a. As to the construction of limitations to heirs, see *ante*, pp. 122, 124.

(*k*) *Shelley's Case*, 1 Co. 93 b; Tud. L. C. Conv. 332; *Quarm v. Quarm*, [1892] 1 Q. B. 184; 61 L. J. Q. B. 154.

See *post*, p. 247.

(*l*) *Denn v. Bagshaw*, 6 T. R. 512; *Doe v. Scudamore*, 2 B. & P. 289.

(*m*) *Boraston's Case*, 3 Co. 19 a; Tud. L. C. Conv. 427; *Weale v. Lower*, Pollex. 54.

(*n*) *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. C. 191.

(*o*) *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121; and see *ante*, pp. 138, *et seq.*

(*p*) See *Doe v. Elvey*, 4 East, 313; and see Butler's note to Fearn, Cont. Rem. 7.

would operate to divest the fee and would not be a remainder ; it would be void at common law, but might be good as a shifting use or as an executory devise (*q*).—So if land be limited to A. in tail *male*, and if he die without issue to B., the remainder to B. is contingent upon the failure of issue general concurring with the failure of issue male, whereby the particular estate is determined (*r*). So if land be limited to A. in tail, and if he die under twenty-one and without issue to B., the remainder is contingent upon the determination of the estate tail by death without issue under twenty-one, and if A. attain that age, though he die without issue it fails (*s*).

Contingent remainder must have a particular estate of freehold.

The principle of the common law that the seisin of the freehold can never be in abeyance, but must always be vested in some determinate person imposed two rules upon the limitation and operation of contingent remainders:—The first of which rules was that a contingent remainder of freehold must always have a particular vested estate of freehold to support it (*t*).

Limitation of term of years with remainder of freehold.

A lease for a term of years does not interfere with the limitation or vesting at the same time of the freehold estate, subject to the term, as it deals only with the *de facto* possession. Therefore, if land be limited to A., for a term of years, with remainder to B. for life or in fee, the limitation to B. is a remainder only in regard to the *de facto* possession ; but as regards the seisin of the freehold it is an immediately vested estate (*u*). And if the remainder to B. were limited upon a contingency, as if he should survive A., the limitation would purport to dispose of the freehold *in futuro* leaving it in abeyance until the contingency occurred ; it would, therefore, be void at common law, and the next limitation of the freehold (if any), or the reversion of the lessor would take immediate effect (*x*).

To A. for years with remainder to heirs of A.

So also, if land be limited to A. for years with remainder to the heirs of A., the limitation to the heirs of A. is void, as of a freehold *in futuro* (*y*).—But if limitations be made to A. for years, with remainder to B. for his own or A.'s life or for any other freehold estate, with remainder to the heirs of A., there is

(*q*) See *post*, pp. 253, 257.

(*r*) *Cole v. Sewell*, 4 Dr. & War. 1 ; 2 H. L. C. 186. See *Re Ashforth*, [1905] 1 Ch. 535 ; 74 L. J. C. 361.

(*s*) *Grey v. Pearson*, 6 H. L. C. 61. See *post*, p. 261.

(*t*) *White v. Summers*, [1908] 2 Ch.

256 ; 77 L. J. C. 506 ; *Fearne*, Cont. Rem. 281.

(*u*) Co. Lit. 49 *a*. See *De Grey v. Richardson*, 3 Atk. 469.

(*x*) Co. Lit. 217 *a* ; see *ante*, p. 33.

(*y*) *Goodright v. Cornish*, 1 Salk. 226 ; Co. Lit. 217 *a*.

a vested freehold in B. which will support the contingent remainder (z).

If land be limited to A. for a term of years, if he shall so long live, with remainder, after the death of A., to B., such remainder is contingent, because the death of A. may not happen until after the expiration of the particular estate; it is therefore void for want of a preceding freehold to support it. If the remainder in such case be limited "after the determination of the term" instead of after the death of A. (so as to take effect whether the term determined by lapse of time, or by the death of A.) it would be good as a vested estate; or if the gift over be after the death of A., "or other sooner determination of the term," the remainder has been construed as if limited after the determination of the term, the words "after the death of A." being rejected, and consequently to be a vested estate (a).

To A. for years, if he shall so long live, remainder after death of A. to B.

The other rule resulting from the principle above stated is,—That a contingent remainder must formerly have become vested during the continuance of the particular estate or at the instant of its determination. If not then vested, it failed altogether, and the next limitation took immediate effect (b).

Contingent remainder must vest before or at the determination of the particular estate.

For example, if land were limited to A. for life or in tail, with remainder to the heir of B., and A. died or died without issue, before B., there was no person then ascertained as heir of B. to take the remainder and it became void of effect (c).—Where land was devised to A. for life, and after his death to the children of B., if he left any him surviving, and A. died in the lifetime of B., the contingent remainder to B's children failed (d).—So if land were limited to A. for life, remainder to B. for years, remainder to the heir of B., the contingent remainder to the heir was defeated by the death of A. before B., and the consequent determination of the particular estate of freehold before the ascertainment of the heir of B. (e).

Examples.

It was sufficient that the remainder became vested at the instant of the determination of the particular estate (f).—Thus if land be limited to A. during the life of B. with remainder to the

(z) See *Egerton v. Brownlow* (Earl), 4 H. L. C. 1; 23 L. J. C. 348.

(a) *Boraston's Case*, 3 Co. 19 a; Tnd. L. C. Conv. 427; *Goodtitle v. Burtonshaw*, Fearne, Cont. Rem. App. I.; *Doe v. Morgan*, 3 T. R. 763; *Cunliffe v. Brancher*, 3 Ch. D. 393; 46 L. J. C. 128; Fearne, Cont. Rem. 8, 21; Sugden's note, Gilbert, Uses, pp. 164 *et seq.*

(b) *Archer's Case*, 1 Co. 66 b; *Chud-*

*leigh's Case*, 1 Co. 120 a; *White v. Summers*, [1908] 2 Ch. 256; 77 L. J. C. 506; Fearne, Cont. Rem. 307.

(c) *Doe v. Morgan*, 3 T. R. 763; Co. Lit. 378 a. See *Winter v. Perratt*, 9 Cl. & F. 606.

(d) *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. C. 191.

(e) *Doe v. Morgan*, 3 T. R. 763.

(f) Fearne, Cont. Rem. 310.

right heirs of B., the death of B. determines the particular estate and at the same time vests the remainder by ascertaining the heir (*g*).—So, if land be limited to A. and B. for their joint lives with remainder to the survivor, or to the survivor in fee (*h*).—Or if land be limited to A. and B. during their joint lives, with remainder to the heirs of him who shall die first (*i*).—So to A. in tail, and if he die without issue living at his death, to B. (*k*).

Exception as  
to posthumous  
children.

An exception to the rule occurs in favour of posthumous children; for it was decided by the House of Lords that a child *en ventre sa mère*, who is afterwards born, is to be considered as in existence for its benefit, as for the purpose of inheriting, or of taking by purchase or by devise under the description of a child or even of a child “born;” and so also for the purpose of preventing a gift over dependent upon its non-existence from operating to deprive it of property. This rule of construction has been extended in terms to marriage or other settlements by 10 & 11 Will. III., c. 16, but the statute has always been regarded as extending to wills, and to be confirmatory of the law (*l*).

A posthumous child taking a remainder under the statute becomes entitled to the intermediate rents and profits of the lands settled from the determination of the particular estate (*m*). But a child *en ventre sa mère* becoming entitled by descent or by devise in defeasance of the estate of an heir or residuary devisee is not entitled to the intermediate rents accrued due before the birth (*n*).

Destruction  
of contingent  
remainder by  
forfeiture,  
surrender, or  
merger of the  
particular  
estate.

Contingent remainders were liable to fail by the determination, by forfeiture, surrender, or merger, of the preceding particular estate of freehold before it had reached its prescribed term of limitation; and these means might be employed for the purpose of defeating and destroying contingent remainders. A tenant for life might effect a forfeiture at common law, to the extinguishment of his own estate and the consequent destruction of contingent remainders expectant upon it, by making a feoffment in fee (*o*); also by levying a fine or suffering a recovery (*p*).

(*g*) Co. Lit. 298 *a*.

(*h*) *Biggot v. Smyth*, Cro. Car. 102; *Quarm v. Quarm*, [1894] 1 Q. B. 184. See *Whitby v. Von Luedcke*, [1906] 1 Ch. 783; 75 L. J. C. 359. And see *Doe v. Tomkinson*, 2 M. & S. 165.

(*i*) Co. Lit. 378 *b*.

(*k*) *Doe v. Elvey*, 4 East, 313. And see Butler's note to Fearn, Cont. Rem. 7.

(*l*) *Reeve v. Long*, 1 Salk. 227; *Villar*

*v. Gilbey*, [1907] A. C. 139; 77 L. J. C. 339; *Re Salaman*, [1908] 1 Ch. 4; 77 L. J. C. 60; Butler's note (3) to Co. Lit. 298 *a*.

(*m*) *Basset v. Basset*, 3 Atk. 203. See *Goodale v. Gawthorne*, 2 Sm. & G. 375; 23 L. J. C. 878.

(*n*) *Richards v. Richards*, Johns. 754; *Re Mowlem*, L. R. 18 Eq. 9.

(*o*) *Archer's Case*, 1 Co. 66 *b*.

(*p*) *Doe v. Burnshall*, 6 T. R. 30;

But the law leans against a forfeiture, and where an assurance might transfer an interest without working a forfeiture, that intention was presumptively imputed to the parties (*q*).

A tenant for life might also destroy the contingent remainders expectant upon his estate by surrendering his estate to the next vested estate in remainder (*r*); or by acquiring to himself by purchase the next vested estate in remainder (*s*); by which means his estate which supported the remainders would become merged and extinguished. And a merger might also be effected, and the contingent remainders destroyed by the union of the particular estate and the next vested remainder by conveyance to a third person (*t*); or by the descent of the freehold reversion upon the devisee of the particular estate unless he claimed by descent immediately from the testator (*u*). And contingent remainders might be effectively interposed between a particular estate and the inheritance limited to the same person by one conveyance (*x*).

Whilst contingent remainders were liable to fail by such premature determination of the particular estate, it was the practice, where it was required to settle a particular estate for life with contingent remainders, (as is usual in family settlements of land on parents for life with remainders to their future children,) to limit an estate to trustees and their heirs by way of remainder upon the determination of the estate for life by forfeiture or otherwise in the lifetime of the tenant for life, such estate to continue during the life of the tenant for life (*y*). This estate of the trustees, being a vested remainder by reason of the possibility of the particular estate for life determining during the lifetime of the tenant for life, though uncertain as to ever coming into possession, was sufficient to support the contingent remainders (*z*). And it was declared to be held upon trust for the prior tenant for life and to preserve the contingent remainders; therefore any alienation or dealing with the estate tending to the destruction

Preservation of contingent remainders—trustees to preserve contingent remainders.

*Burnsall v. Davy*, 1 Bos. & P. 215; *Doe v. Howell*, 10 B. & C. 191; *Doe v. Gatacre*, 5 Bing. N. C. 608.

(*q*) *Loyd v. Brooking*, 1 Vent. 188; *Smith v. Clyfford*, 1 T. R. 738. See *Jerritt v. Weare*, 3 Price, 575; *Francis v. Minton*, L. R. 2 C. P. 543; 36 L. J. C. P. 201.

(*r*) *Thompson v. Leach*, 2 Salk. 427; 2 Vent. 198.

(*s*) *Purefoy v. Rogers*, 2 Wms. Saund. 768.

(*t*) *Egerton v. Massey*, 3 C. B. N. S.

338.

(*u*) *Plunket v. Holmes*, T. Raym. 28; 1 Lev. 11. See nn. (1) and (b) to *Purefoy v. Rogers*, 2 Wms. Saund. 769—774; *Fearne*, Cont. Rem. 341.

(*x*) *Fearne*, Cont. Rem. 345; *Lewis Bowles's Case*, 11 Co. 79 b; Tud. L. C. Conv. 86.

(*y*) See *per Cur. Loyd v. Brooking*, 1 Vent. at p. 189.

(*z*) *Fearne*, Cont. Rem. 217, 326; *Parkhurst v. Smith*, Willes, 327.

of the remainders was a breach of trust for which the trustees were responsible, and which might also affect those claiming title through them (*a*). In the absence of an express trust for preserving contingent remainders, such a trust could not be implied, even in a will, and the remainders were destructible without breach of trust (*b*).

Statutes.

The limitation to trustees to preserve contingent remainders against destruction by the forfeiture, surrender, or merger of the particular estate, was rendered unnecessary by sect. 8 of the Real Property Act, 1845 (8 & 9 Vict. c. 106), which enacts in substance that a contingent remainder may take effect as if the preceding estate had not been determined by forfeiture, surrender or merger. And by the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), it is enacted that every contingent remainder created by any instrument coming into operation after August 2nd, 1877, in tenements or hereditaments of any tenure, "which would have been valid as a springing or shifting use had it not had a sufficient estate of freehold to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation." This statute was passed to override the decision in *Cunliffe v. Brancker* (*c*), and obviously does not affect the rule of law that where a contingency is limited to depend upon an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise (or springing or shifting use), but a contingent remainder only (*d*). It seems to follow accordingly that the restrictions placed upon the operation of executory limitations by sect. 10 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), would not apply to a contingent remainder saved from destruction by the earlier statute. It has been suggested that a limitation to trustees might still be necessary where a contingent remainder was limited to a person not ascertainable within the limits of time prescribed by the rule against perpetuities (*e*), but it has been held recently that a contingent remainder of the legal estate is void if obnoxious to that

(*a*) *Fearne*, Cont. Rem. 326; *Mansell v. Mansell*, 2 P. Wms. 678; *Cas. t. Talb.* 252; *Biscoe v. Perkins*, 1 V. & B. 485. See *Basset v. Clapham*, 1 P. Wms. 358.

(*b*) *Collier v. Walters*, L. R. 17 Eq. 252; 43 L. J. C. 216.

(*c*) *Cunliffe v. Brancker*, 3 Ch. D. 393;

46 L. J. C. 128.

(*d*) *Purfoy v. Rogers*, 2 Wms. Saund. 768, 781; *Doe v. Howell*, 10 B. & C. 191; *Cole v. Sewell*, 4 Dr. & War. 1; 2 H. L. C. 186; *Hawes v. Hawes*, 14 Ch. D. 614.

(*e*) See *post*, p. 316.



rule (*f*). It appears, therefore, that a limitation to trustees to preserve can in no circumstances serve any useful purpose at the present day.

A copyhold surrendered to uses in the form of a particular estate with a contingent remainder was governed by a similar rule to that of the common law, and the remainder must have vested before or at the determination of the particular estate. But a contingent remainder of copyhold was never liable to fail by the premature determination of the particular estate by forfeiture, surrender, or merger; because, the freehold remaining in the lord, the copyhold estate was not subject to the rules peculiar to the freehold which caused the failure of contingent remainders, and the lord was bound to admit to the tenancy according to the limitations of the surrender. Hence trustees to preserve contingent remainders were not required or employed in the settlement of copyholds, as they were in freeholds, to guard against the like dealings or casualties affecting the particular estate (*g*).

Contingent remainder of copyholds.

A contingent remainder of copyhold may also be destroyed by an enfranchisement, conveying the freehold to the tenant of the particular estate; for the consequence is to extinguish that estate and destroy the tenure (*h*).

Destroyed by enfranchisement.

If land be limited to a person for life with remainder to his unborn child or children, the land is thereby rendered inalienable, by reason of the uncertainty as to the owner, until a child is born in whom the remainder may vest, or until the life estate is determined without such child coming into existence; and if the remainder were limited to such child for life, it would, on becoming vested, support a contingent remainder to the child of such child, which would be inalienable until such latter child came into existence; and thus by a series of contingent remainders for life estates to children of successive generations the land might be settled inalienably for an indefinite period, if no rule of law intervened to prevent it (*i*).

Remainder to unborn child.

(*f*) *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. C. 361; *Whitby v. Von Luedcke*, [1906] 1 Ch. 783; 75 L. J. C. 359.

(*g*) *Fearne*, Cont. Rem. 319, 320; *Pickersgill v. Grey*, 30 Beav. 352.

(*h*) *Roe v. Briggs*, 16 East, 406. See *Ex p. School Bd. for London*, 41 Ch. D. 547; 58 L. J. C. 752.

(*i*) All contingent remainders were inalienable by direct conveyance at

common law; but if limited to a certain owner they might be released: *Chudleigh's Case*, 1 Co. 120 *a*; Co. Lit. 265 *a*, n. (1); or devised by will: *Jones v. Roe*, 3 T. R. 88; and were assignable in equity: *Crofts v. Middleton*, 8 De G. M. & G. 192. They were also alienable by way of estoppel, that is by a fine or deed dealing with such interest as if vested, which the owner upon the

Remainder to child of unborn child. A remainder may be limited within the limits of the rule against perpetuities to an unborn child of a living person, who must come into being during the continuance of the particular estate, but a further remainder limited by way of purchase to a child or more remote issue of such child is void (*k*).

Remainder to unborn child for life. The remainder to the unborn child of a living person may be limited for life or other particular estate; and the further remainder may be limited over subject to the restriction of the above rule (*l*).

Strict settlement. Hence it appears that the only mode of providing in a settlement of land for remoter issue than unborn children is by including them in the estate limited to their parents, that is, by limiting remainders to the unborn children in tail, under which their issue will take, if not barred by a disentailing deed of their ancestor. This form of settlement, namely, to a person for life with remainder to his children successively in tail, is commonly known as a "strict settlement" (*m*). The remainder in tail may remain in contingency until the death of the tenant for life, and in the case of a posthumous child, during the further period of gestation. If the tenant in tail be an infant at the death of the tenant for life, he will not have power to bar his issue until he has attained full age, and the land may thus be inalienable for a further period of twenty-one years. Therefore the extreme time during which a settlement of land may remain effectual under common law limitations is during a life or lives in being at the time of the settlement and twenty-one years afterwards, with a possible extension during the gestation of a posthumous child (*n*).

*Cy pres* doctrine of construction of wills.

Under the doctrine of *cy pres*, the court has been able to give effect to the rule of construction *Verba intelligenda sunt ut res magis valeat quam pereat*. Where a will devises freehold lands in terms to the unborn child of a person for life, with remainder to the children or issue of such child, in terms which manifest a general intention that the land shall be descendible to the children and remoter issue in succession, it will be construed to give an estate tail, or an estate tail male, in furtherance of the

remainder becoming vested was estopped from contradicting: *Doe v. Oliver*, 10 B. & C. 181; 2 Smith, L. C. 724. Contingent remainders were made alienable by deed by the statute 8 & 9 Vict. c. 106, s. 6.

(*k*) *Re Frost*, 43 Ch. D. 246; 59 L. J. C. 118; *Whitby v. Mitchell*, 44 Ch. D. 85; 59 L. J. C. 485; *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. C. 361; *Whitby v. Ton Luedcke*, [1906] 1 Ch.

783; 75 L. J. C. 359.

(*l*) *Williams v. Teale*, 6 Hare, 239; *Re Dawson*, 39 Ch. D. 155; *Symes v. Symes*, [1896] 1 Ch. 272; 65 L. J. C. 265.

(*m*) See *Douglas v. Congreve*, 1 Beav. at p. 71; *Fearne, Ex. Div.* 502.

(*n*) See Butler's note to *Fearne*, Cont. Rem. 562; 2 *Prideaux Conv.* 261; *Davidson, Prec. Vol. III. Part I.*

general intention; but the *cy pres* doctrine is not applied where the general intention appears of creating a succession of life estates to the issue of the unborn person in perpetuity, and not a descendible estate in such issue (o).—Words of distribution amongst the issue, as tenants in common, may be rejected in furtherance of the general intention of giving an estate tail (p).

It does not apply where the estate of the ancestor is limited for a term of years only, as for a term of ninety-nine years if he shall so long live (q); nor does it apply as to persons born after the date of the will in the testator's lifetime, though as to others in the same class of unborn children, to whom and whose issue the devise is made, it may still apply (r);—nor does it apply where the remainder over is restricted to some only of the issue of the unborn tenant for life, as a first son only exclusive of the rest, or is extended so as to include persons whom the testator did not contemplate as objects of his bounty (s).

Limits of application of *cy pres* doctrine.

It does not apply to personal estate or chattels real (t); and it has never been applied to the construction of deeds (u).

The doctrine applies to appointments by will under powers; and under such appointments there is further occasion for applying the doctrine where the remainders are void, not on the ground of perpetuity, but as being in excess of the power (x).

Applied to appointments by will under powers.

The limitation of a contingent remainder for life or in tail, as it conveys no estate, but only a possibility of an estate in a future event, does not interfere with the limitation of a vested estate of freehold in remainder; and upon the contingent remainder becoming vested during the continuance of the particular estate, the vested remainder will be postponed in interest. As if land be limited to A. for life, with remainder to his first and other sons (persons unborn) successively in tail, with remainder to B., a person *in esse*, for life, with remainder over, under which gift B. takes a vested interest in remainder expectant upon A.'s life estate until the birth of a son to A.,

Contingent remainder for life or in tail with vested remainder.

(o) *Seaward v. Willock*, 5 East, 198; *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93; *Re Richardson*, [1904] 1 Ch. 332; 73 L. J. C. 153; *Hampton v. Holman*, 5 Ch. D. 183; 46 L. J. C. 248.

(p) *Pitt v. Jackson*, 2 Bro. C. C. 51; *Vanderplank v. King*, 3 Hare, 1; *Parfitt v. Hember*, L. R. 4 Eq. 443.

(q) *Somerville v. Lethbridge*, 6 T. R. 213; *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801.

(r) *Vanderplank v. King*, 3 Hare, 1.

(s) *Monypenny v. Dering*, 16 M. & W. 418; 2 De G. M. & G. 145; 22 L. J. C. 313; *Re Mortimer*, [1905] 2 Ch. 502; 74 L. J. C. 745.

(t) *Routledge v. Dorril*, 2 Ves. jun. 357.

(u) *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 390.

(x) Sugden on Powers, 498; *Re Rising*, [1904] 1 Ch. 533; 73 L. J. C. 455. See *post*, p. 302.

whereupon it becomes expectant upon the intervening estate tail (*y*).

Contingent remainder in fee.

Where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested; but two or more several contingent remainders in fee may be limited as substitutes or alternatives one for the other, so that one only take effect, and each subsequent limitation be substituted for a former if it should fail of effect (*z*); and the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator until the contingency happens to take it out of them (*a*). Upon a devise of a contingent remainder in fee, the fee subject to the contingency will pass as a vested remainder under the will by a specific or residuary devise (*b*).

Contingent remainder in fee with vested remainder.

Limitations united subject to intervening remainder.

Where the particular estate and ultimate remainder are limited at the same time to the same person, though they may become united by the doctrine of merger or under the rule in *Shelley's Case* for most purposes, they do not exclude intervening contingent remainders from taking effect upon the happening of the contingency during the particular estate;—as if land be limited to A. for life, with remainder to the first and other sons of A. successively in tail, with remainder to A. in fee, the limitations unite in A. until the birth of his first son, when the contingent remainder becomes vested and divides them (*c*).

Several contingent remainders.

So, if there be several contingent remainders, a subsequent one may become vested before a preceding one, but subject to giving place on the preceding one becoming vested during the particular estate which supports it (*d*).

Contingency affecting subsequent limitations.

When a contingent remainder is followed by other limitations a question of construction may arise, whether the contingency affects the first estate only or extends to the subsequent limitations (*e*).

(*y*) *Chudleigh's Case*, 1 Co. 120 *a*; *Lewis v. Waters*, 6 East, 336; *Driver v. Frank*, 3 M. & S. 25; 8 Taunt. 468. See *White v. Summers*, [1908] 2 Ch. 256.

(*z*) *Lodding v. Kime*, 1 Salk. 224; 1 L. Raym. 203; *Doe v. Elvey*, 4 East, 313; *Doe v. Ford*, 2 Ell. & B. 970; 23 L. J. Q. B. 53; *Perceval v. Perceval*, L. R. 9 Eq. 386. See the other cases cited *Fearne, Cont. Rem.* 225, 373. And see *Re Bowles*, [1905] 1 Ch. 371; *Sanders, Uses*, 149.

(*a*) *Fearne, Cont. Rem.* 351, and cases

there noted; *Purefoy v. Rogers*, 2 Wms. Saund. 768, and notes.

(*b*) *Egerton v. Massey*, 3 C. B. N. S. 338; 27 L. J. C. P. 10.

(*c*) *Lewis Bowles' Case*, 11 Co. 79 *b*; Tud. L. C. Conv. 86. And see *ante*, pp. 238, 239.

(*d*) *Uredale v. Uredale*, 2 Roll. Ab. 119. See *Garth v. Cotton*, 1 Dick. 183; 2 Wh. & T. L. C. 970.

(*e*) *Doe v. Ford*, 2 Ell. & B. 970; 23 L. J. Q. B. 53. See *Fearne, Cont. Rem.* 233.

The inconveniences which would follow from the adoption of a contrary rule have induced judges to adopt, as an established rule, that all estates are to be treated as vested, unless this construction would do violence to the language used (*f*).—Words of futurity or contingency are *primâ facie* referred to the commencement or duration of the estate in respect of possession, and not to the vesting; as in the simple case of a limitation to A. for life and “*from and after his decease*” to B., the estate of B. is not contingent upon B. surviving A., but is an immediately vested remainder (*g*).

Construction of remainders as vested or contingent.

Words of contingency referred to possession rather than vesting.

So, in the case of limitations expressed to be *in default of*, or *for want of*, or *upon failure of*, the objects of prior limitations, such expressions are *primâ facie* referred to the determination or failure of the prior estates limited and not to the failure of the objects to whom they are limited, and are commonly employed merely to carry on the series of limitations in the sense of the word *remainder*;—for example, if land be limited to A. for life, and after his decease to the first and other sons of A. for life or in tail, and *in default of* such sons or *on failure of* such issue to B., the estate of B. is not contingent upon A. not having a son or issue, but is a vested remainder expectant on the determination of the prior estates, by the death of the sons or failure of issue (*h*).—If in such case the remainder be limited in default of sons or failure of issue in the lifetime of A. or of B. or other definite period, it is then contingent upon such events happening and the consequent determination of the prior estate within the prescribed period (*i*).

Limitations over *in default*, *for want*, etc., of objects of prior limitation.

A strong example of this principle of construction occurs where a testator devises to his widow an estate for life, with a devise over *if she shall marry again*; the devise over is construed to give a vested remainder expectant upon the determination of the widow's estate, whether by marriage or death, and not a remainder contingent only upon her re-marriage, unless the context shows that it was the testator's intention that the gift should be contingent upon the happening of one or other event (*k*).

Devise to widow until marriage with devise over upon marriage.

(*f*) *Hawes v. Hawes*, 14 Ch. D. 614. See Best, C. J., *Duffield v. Duffield*, 3 Bli. N. S. at p. 331; 1 Dow. & Cl. at p. 311; Stuart, V.-C., *Browne v. Browne*, 3 Sm. & G. at p. 588.

(*g*) *Doe v. Ewart*, 7 A. & E. 636; 7 L. J. Q. B. 177.

(*h*) Notes to *Boraston's Case*, 3 Co. 19 *a*; Tud. L. C. Conv. 427.

(*i*) *Coltsmann v. Coltsmann*, L. R. 3

H. L. 121; *Dawson v. Small*, L. R. 9 Ch. 651. See Fearn, Cont. Rem. 420; *ante*, pp. 245 *et seq.*

(*k*) *Sheffield v. Orrery (Lord)*, 3 Atk. 282; *Underhill v. Roden*, 2 Ch. D. 494; *Scarborough v. Scarborough*, 58 L. T. 851; *Re Cane*, 60 L. J. C. 36; *Re Tredwell*, [1891] 2 Ch. 640; 60 L. J. C. 657. See *Re Akeroyd's Settlement*, [1893] 3 Ch. 363; 63 L. J. C. 32.

Remainder construed to vest as soon as possible.

Upon the same principle a remainder is construed to vest as soon as possible; and if once vested cannot be divested under the same limitation so as to admit of another person in substitution of the person in whom it has vested (*l*). Thus, a devise to A. for life, with remainder to his second and other sons successively in tail (excepting the first or eldest son), A. then having no sons, was held not to give a contingent remainder to such person as should be the second son of A. at his death, but to the second son born, living an elder, who took on his birth an immediately vested and indefeasible remainder (*m*).—So, an ultimate remainder in a will to the testator's heir is construed as vesting at the death of the testator, and not as contingent to the person answering the description of heir at the determination of the particular estates (*n*).

Remainder to a class vests in all ascertained at determination of particular estate.

A modification of the above principle of construction occurs with a remainder limited to a class of persons, as children, grandchildren, issue, brothers and sisters, cousins and the like, which, though vested, as soon as an object of the limitation can be ascertained, in that object, admits of participation by other objects who become ascertained before or at the determination of the particular estate. Thus, if land be limited by settlement or will to A. for life, with remainder to his children, or to the children of B., the remainder is vested in all the children in existence when the instrument takes effect, or it becomes vested as soon as any come into existence; but it is subject to divesting *pro tanto* in favour of other children as they come into existence until the death of A., when the estate comes into possession, and no after born children can participate (*o*).

Remainder to children who shall attain 21.

If land be limited to A. for life, with remainder to such of the children of A. as shall attain twenty-one, the remainder is contingent upon children attaining twenty-one in the life of A. and vests in such children only (*p*).—In some cases the construction of the contingency as to age may be such as to render the estates of the children defeasible only if they do not attain the age (*q*).

(*l*) *Driver v. Frank*, 3 M. & S. 25; 8 Taunt. 464; *Winter v. Perratt*, 9 Cl. & F. 606.

(*m*) *Driver v. Frank*, 3 M. & S. 25; 8 Taunt. 468; and see a like construction in *Adams v. Bush*, 6 Bing. N. C. 164.

(*n*) *Doe v. Macey*, 12 East, 589; *Wrightson v. Macaulay*, 14 M. & W. 214; 15 L. J. Ex. 121. See *ante*, p. 124.

(*o*) *Sussex (Earl) v. Temple*, 1 Ld. Raym. 311; *Oates v. Jackson*, 2 Stra.

1172; *Doe v. Perryn*, 3 T. R. 484; *Doe v. Martin*, 4 T. R. 39; *Mogg v. Mogg*, 1 Mer. 654. See *Itc Merriu*, [1891] 3 Ch. 197; 60 L. J. C. 671.

(*p*) *Festing v. Allen*, 12 M. & W. 279; 13 L. J. Ex. 74; 5 Hare, 573; *Holmes v. Prescott*, 33 L. J. C. 264; *Perceval v. Perceval*, L. R. 9 Eq. 386; *Astley v. Micklethwait*, 15 Ch. D. 59; 49 L. J. C. 672.

(*q*) *Doe v. Nowell*, 1 M. & S. 327. See *Pearks v. Moseley*, 5 App. Cas. 714; 50 L. J. C. 57.

§ 4. THE RULE IN SHELLEY'S CASE.

The Rule stated—application of the rule—where the remainders are contingent.

Remainder to heir as purchaser—remainder to heir with additional words of limitation.

Estate of freehold in ancestor—estate *pur autre vie*—estate determinable by conditional limitation—estate for years.

Limitations in separate instruments.

Limitations of estate *pur autre vie*—of term of years—lease for life with remainder to executors for term of years.

Limitations in the form of remainders to the *heirs*, or to the *heirs of the body*, or in other terms designating persons taking in a course of descent, which taken alone would create a contingent remainder in the person answering to such designation, are modified in effect by the special rule of law known as the Rule in *Shelley's Case*.

The rule in *Shelley's Case* stated.

This rule, in its simplest form, has been already referred to; it may be stated in more general terms as follows:—If an estate of freehold be limited to a person (*a*), and by the same deed or instrument an estate be limited in the form of a remainder, whether immediately expectant on the former estate or after other estates interposed, to “the heirs” or to “the heirs of the body” of the same person, the words “heirs” or “heirs of the body” are words of limitation of an estate of inheritance in the ancestor, and the heirs can take only by descent and not as purchasers (*b*). In the attempts to trace the origin of this rule, now entirely a matter of conjecture, it does not appear to have occurred to anyone that the explanation is to be found in this, that originally, as is now the case under the Inheritance Act, 1833 (3 & 4 Will. IV. c. 106), descent was traced from a purchaser (*c*). Under this system the word “heir” must have represented a person claiming under another in a chain of descent, and not one who, by becoming the person last seised, himself represented a designated person from whom title was to be traced. Accordingly a grant to a man and his heirs could only mean an estate vested in him and those persons who could claim by descent from him. That the law attached the quality of alienability to this estate could no more govern the legal effect of these words, than that the

(*a*) *Pibus v. Mitford*, 1 Vent. 372. See *post*, p. 254.

(*b*) *Shelley's Case*, 1 Co. 93 *b*; Tud. L. C. Conv. 332; *Van Grutten v.*

*Fowell*, [1897] A. C. 658. As to the application of the rule to Uses, see *post*, p. 252, and to Wills, see *post*, p. 258.

(*c*) See *ante*, pp. 23, 43, 44.

inheritance was not partible among his immediate descendants except in the case of gavelkind lands. It is doubtless because the court was dealing with the legal effect of the words—probably this is all that is meant by the expression “rule in law”—that words attempting to qualify the result were generally rejected, although it must be admitted that the decisions are not uniform (*d*).

Application  
of rule.

Thus, limitations in the form, to A. for life and after his decease to his heirs, or with remainder to his heirs, are equivalent to the limitation to A. and to his heirs, which denotes a fee simple in A.;—so a limitation to A. for life and after his decease to the heirs of his body, is equivalent to the limitation to A. and to the heirs of his body, and denotes an estate tail (*e*).

Where there  
are inter-  
mediate re-  
mainders.

And if there be an intermediate estate interposed between the freehold estate and the limitation to the heirs, as to A. for life, with remainder to B. for life or in tail, with remainder to the heirs or heirs of the body of A., the latter limitation vests the remainder in A., and is equivalent to a limitation of the remainder in the terms to A. and to his heirs or to A. and to the heirs of his body; and in such cases the heir can take nothing except by descent from A. (*f*).

Intermediate  
contingent  
remainders.

If the limitations intervening between the preceding freehold and the subsequent limitation to the heirs or heirs of the body are contingent, they are not destroyed by the rule; but, as long as there are no vested remainders intervening, the two limitations are united in the ancestor, subject to admitting the intervening limitations to take effect, if they become vested during the continuance of the preceding freehold (*g*).

Contingent  
remainder to  
heirs.

The rule applies, where the remainder is limited to the heirs or heirs of the body of A. upon a contingency; as upon limitations to A. for life, and if A. die before B., to the heirs of A.,—or to A. and B. during their joint lives, with remainder to the heirs of him who dies first,—in such case A. takes the contingent remainder in fee, and the heir takes nothing except by descent (*h*).

(*d*) *Roe v. Bedford*, 4 M. & S. 362; *Douglas v. Congreve*, 1 Beav. 59. See notes to *Shelley's Case*, Tud. L. C. Conv. at p. 345, and the cases cited pp. 140 *et seq.*, *ante*. And see *Sudbury (Corp.) v. Empire Electric Light and Power Co.*, [1905] 2 Ch. 104; 74 L. J. C. 442; where declaratory words, defining the object of an agreement, were rejected.

(*e*) See notes Tud. L. C. Conv. to *Shelley's Case*, and see *ante*, pp. 119, 123, 130, 135.

(*f*) *Coulson v. Coulson*, 2 Atk. 245; 2 Stra. 1125; *Roe v. Bedford*, 4 M. & S. 362; *Doe v. Welford*, 12 A. & E. 61. See *Goodright v. Wright*, 1 P. Wms. 397.

(*g*) *Lewis Bowles' Case*, 11 Co. 79 *b*; Tud. L. C. Conv. 86.

(*h*) *Fearne*, Cont. Rem. 34; Co. Lit. 378 *b*. See *Crofts v. Muddleton*, 8 D. M. & G. 192; 25 L. J. C. 513; *Re Score*, 57 L. T. 40.



The word "heir," however, may be used in a context or with an additional description rendering it incapable of being construed as a word of limitation, as in a limitation to the "heir," or to the "heir male," or to the "heir now living"; and it must then be taken as a word of purchase giving a remainder, contingent or vested, to the person so designated (*i*).

Remainder to heirs as purchasers.

But the import of the words 'heirs' or 'heirs of the body' as words of limitation within the rule is not affected by the addition of other words of limitation altering the course of descent (*j*).

Heirs with additional words of limitation.

The rule applies where the ancestor takes any particular estate of freehold, as an estate for life, or an estate tail (*k*)—or an estate *pur autre vie* (*l*)—or an estate of freehold, determinable by a conditional limitation, as an estate during widowhood (*m*). And if there were intermediate remainders interposed between the freehold and the limitation to the heirs, the freeholder would take a vested remainder in fee or in tail (*n*).

Estate of freehold in the ancestor,—*pur autre vie*. Determinable estate.

But the rule does not apply if the ancestor take only an estate for years and not a freehold estate. The subsequent limitation to his heirs or to his heirs of the body does not then vest any estate in him, and can operate only by way of purchase to the heir designated; because by the common law a term of years or chattel interest does not affect the limitation of the freehold title subject to it (*o*). In such case if the limitation to the heirs be preceded by an estate of freehold in another, it may be good as a contingent remainder to the person answering the description of heir; as, if land be limited to A. for years, with remainder to B. for life, with remainder to the heirs of A., there is a contingent remainder to the heir of A., who will take in the event of A. dying before the determination of B.'s estate (*p*); and this contingent remainder will be void if it be not preceded by an estate of freehold (*q*).

Estate for years in ancestor.

The rule does not apply to limitations by separate instruments;—as where A. being tenant for life, with remainder to

Rule not applied to limitations in separate instruments.

(*i*) *Archer's Case*, 1 Co. 66 *b*; *James v. Richardson*, 1 Vent. 334; T. Raym. 330; *Burchett v. Durdant*, 2 Vent. 311; *Evans v. Evans*, [1892] 2 Ch. 173; 61 L. J. C. 456.

(*j*) *Jesson v. Wright*, 2 Bli. 1; *Fetherston v. Fetherston*, 3 Cl. & F. 67; *Doe v. Goldsmith*, 7 Taunt. 209. And see other instances given in Tud. L. C. Conv., notes to *Shelley's Case*, 1 Co. 93 *b*.

(*k*) *Shelley's Case*, 1 Co. 93 *b*; Tud. L. C. Conv. 332; *Goodright v. Wright*, 1 P. Wms. 397.

(*l*) Perkins, s. 337; *Merrel v. Rumsey*, T. Raym. 126; 1 Keb. 888.

(*m*) *Curtis v. Price*, 12 Ves. 89.

(*n*) Fearn, Cont. Rem. 30—34; *Curtis v. Price*, 12 Ves. 89.

(*o*) *De Grey v. Richardson*, 3 Atk. 469; Co. Lit. 200 *b*; Butler's note (1) to Co. Lit. 330 *b*.

(*p*) *Else v. Osborn*, 1 P. Wms. 387; *Coape v. Arnold*, 4 De G. M. & G. 574.

(*q*) Fearn, Cont. Rem. 281. See *Loyd v. Brooking*, 1 Vent. 188.

the heirs of B., afterwards granted his estate to B., who thereby became tenant for the life of A. with remainder to his own heirs, and it was held that the remainder did not unite with the freehold of B., but remained to his heir in contingency (*v*). So where a father, seised in fee, settled the land on his son for life, retaining the reversion in himself, and afterwards by his will, reciting that he had settled the estate on his son for life, devised the same after the son's death to the heirs of his body; it was held that the estate for life being by one instrument and the limitation to the heirs by another could not unite, and the latter took effect as an executory devise to the heir (*s*).—A will and a codicil or schedule to it are considered as one instrument within the rule (*t*).

An apparent exception to the rule requiring the limitations to be in the same deed or instrument occurs where uses appointed under powers may be taken as if inserted in the instrument creating the power (*u*).

Rule not applied to limitations of estate *pur autre vie*.

The rule only applies to the limitations of estates of inheritance. In limiting estates *pur autre vie* the words "heirs," or "heirs of the body," must be construed according to the nature of the estate, and become merely a designation of the person to take as special occupant in case of a vacancy on the death of the grantee before the determination of the estate (*x*).

Limitations of term of years.

If a term of years be limited, by way of trust or executory bequest, to A. for life with remainder to his heirs or to the heirs of his body, these words are, in general, taken as analogous to words of limitation and not as words of purchase, and vest the whole term in A.; for words which would create an estate tail in freeholds confer an absolute interest in personal estate (*y*).—So, if the limitation be to A. for life and after his death to his issue, A. takes the absolute interest (*z*).

To heirs, etc., as purchasers.

But if the limitation over be made to heirs or issue of a restricted or particular kind or designation, or for particular

(*v*) *Anon.*, cited 1 Ld. Raym. 37.

(*s*) *Doe v. Fonnereau*, Dougl. 487.

(*t*) *Huges v. Fowde*, 2 W. Bl. 698. See *Re Fraser*, [1904] 1 Ch. 726; 73 L. J. C. 481; *Douglas-Menzies v. Umphelby*, [1908] A. C. 224; 77 L. J. P. C. 64.

(*u*) *Venables v. Morris*, 7 T. R. 342, 438; *Fearne*, Cont. Rem. 74; *Sugden*, Powers, 471.

(*x*) *Blake v. Lutton*, G. Coop. 178; *Allen v. Allen*, 2 Dr. & War. 307. See *Williams v. Jekyl*, 2 Ves. sen. 681; *Re*

*Barber's Settled Estates*, 18 Ch. D. 624. And see *Fearne*, Cont. Rem. 495.

(*y*) *Webb v. Webb*, 1 P. Wms. 132; *Ware v. Polhill*, 11 Ves. 257; *Murthwaite v. Jenkinson*, 2 B. & C. 357; *Vernham (Earl) v. Bathurst*, 13 Sim. 374; *Williams v. Lewis*, 6 H. L. C. 1013; *Martelli v. Holloway*, L. R. 5 H. L. 532.

(*z*) *Chandless v. Price*, 3 Ves. 99. See *Ward v. Bevil*, 1 Y. & J. 512; *Ex p. Wynd*, 5 De G. M. & G. 188.

estates inconsistent with the import of such words as words of limitation, or if there be other sufficiently marked intention that they should take as purchasers, the rule will not apply; and the limitation to the heirs or heirs of the body can operate only by way of a future trust or executory bequest of the term to them as purchasers (a).

By analogy to the rule in *Shelley's* case, "If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance, (as if an estate for life be made to A. the remainder to B. in tail, the remainder to the right heirs of A., the fee vesteth in A. as it had been limited to him and his heirs), even so are the testators and the executors *correlativa* as to any chattel. And therefore if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors" (b).

Lease for life with remainder to executors for term of years.

Where the beneficial interest in personal estate is limited to one for life, and after his death to his "executors and administrators" (c); or if chattels real be limited to one for life followed by a limitation to his "legal personal representatives" (d); or to his "personal representatives" (e); or to his "legal representatives" (f); or to his "representatives" (g); the estate for life will be enlarged into an absolute interest, the limitation being treated as analogous to a gift to the heirs after a gift for life in the case of freeholds (h). But as they are not technical words, or words of known legal import, they may be explained by the context and treated as words of purchase (i). And where the limitation is to the "next of kin" of the person to whom a life

Gift by way of remainder to "executors and administrators," "representatives," or "next of kin."

(a) *Hodgson v. Bussey*, 2 Atk. 89; *Read v. Snell*, 2 Atk. 642; *Darley v. Martin*, 13 C. B. 683.

(b) Co. Lit. 54 b; but see *Cranmer's Case*, 3 Leon. 20; *Dyer*, 309 a, where a distinction was made as to limitations in the above form by way of use, and it was held that the executor (if any) took by purchase. The old cases upon the construction of such limitations are very contradictory; they are collected in *Williams, Executors*, 530. n. (h). According to *Dyer*, C. J., in *Cranmer's Case*, "If land be leased to A. for life, the remainder for years to his heirs, the remainder for years is in abeyance until the death of the lessee, and then it shall vest in the heir as a purchaser."

(c) *Att.-Gen. v. Malkin*, 2 Ph. 64; *Page v. Soper*, 11 Ha. 321; 22 L. J. C. 1044; *Webb v. Sadler*, L. R. 8 Ch. 419;

42 L. J. C. 498. See *Re Davenport*, [1895] 1 Ch. 361; 64 L. J. C. 252.

(d) *Hincliffe v. Westwood*, 2 De G. & Sm. 216; 17 L. J. C. 167.

(e) *Alger v. Parrott*, L. R. 3 Eq. 328; *Re Best's Settlement*, L. R. 18 Eq. 686; 43 L. J. C. 545. See *Smith v. Barney*, 2 Coll. 728.

(f) *Price v. Strange*, 6 Madd. 159; *Wing v. Wing*, 34 L. T. 941.

(g) *Appleton v. Rowley*, L. R. 8 Eq. 139; 38 L. J. C. 689; *Re Ware*, 45 Ch. D. 269; 59 L. J. C. 717. See *Re Silvester*, [1895] 1 Ch. 573; 64 L. J. C. 390.

(h) See *ante*, p. 248.

(i) *King v. Cleaveland*, 4 De G. & J. 477; 28 L. J. C. 835; *Re Grylls*, L. R. 6 Eq. 589; *Briggs v. Upton*, L. R. 7 Ch. 376; 41 L. J. C. 519.

estate is given, his interest is not enlarged, but the persons answering that description at the date when the life estate ceases will be presumptively entitled (*k*).

## SECTION II. FUTURE USES.

Future uses limited as remainders—application of the rule in *Shelley's* case.

Springing and shifting uses—examples of springing uses—examples of shifting uses.

Resulting use until springing use takes effect—construction of limitation to the use of the heirs of the body of the grantor—limitation to the use of the heirs of the body of another.

Future use after preceeding estate construed as a remainder if possible—limitation which cannot take effect as a remainder.

Future uses limited as remainders.

Future uses limited by way of remainder expectant upon a particular estate are reduced by the statute of Uses into precisely the same position as common law limitations in the same terms, and are subject to the rules of the common law regulating remainders. Accordingly, in the limitation of uses a contingent remainder of freehold requires a particular vested estate of freehold to support it; and it must vest before or at the determination of the particular estate (*a*).

Application of the rule in *Shelley's* case.

The rule in *Shelley's* case applies to limitations of the use by way of remainder to heirs or to heirs of the body, after a prior limitation of the use for a freehold estate to the ancestor, in the same manner as it applies to limitations of the freehold at common law (*b*).—And the rule in *Shelley's* case has an extended application to uses by reason that the ancestor may in certain cases take a particular estate of freehold by implication without express limitation (*c*).

But the application of the rule is confined to future uses which are limited by way of remainder to arise upon the determination of the preceeding estate, and is not extended to those uses, presently to be noticed, which take effect in substitution of the prior use and not as remainders (*d*).

(*k*) *Anderson v. Dawson*, 15 Ves. 532. See *Withy v. Mangles*, 10 Cl. & F. 215.

(*a*) *Chudleigh's Case*, 1 Co. 130 *a*; *Adams v. Savage*, 2 Salk. 679. See Sugden's note to Gilbert, Uses, 164; Sugden, Powers, 34; Fearne, Cont. Rem. 284.

(*b*) Bacon, Uses, 62, Rowe's ed. note (*c*); Co. Lit. 319 *b*. See *ante*, p. 247.

(*c*) *Pibus v. Mitford*, 1 Ventr. 372. See *post*, p. 254.

(*d*) Fearne, Cont. Rem. 276.

A limitation of the use may be made for a freehold estate to commence *in futuro*, without any preceding limitation; also a limitation of the use may be made to take effect in defeasance or substitution of a preceding limitation, and not by way of remainder expectant upon its determination. Such limitations of the freehold at common law were void as placing the immediate freehold in abeyance, or as shifting the freehold without any act or ceremony; but as limitations of the use they were valid before the statute, and by force of the statute are executed as legal estates (*e*).

Springing and shifting uses.

Uses of this kind are called springing or shifting uses:—The term *springing* uses being applicable to those that arise without any preceding limitation of the use;—and the term *shifting* uses being applicable to those which take effect in substitution or defeasance of other uses previously limited (*f*).

Examples of springing uses occur,—upon a bargain and sale to another after seven years (*g*), or after the death of the bargainor, or upon any other specified future event (*h*).—Also upon a covenant to stand seised to the use of another after the covenantor's death, or to the use of the heirs or heirs of the body of another after his death (*i*).

Examples of springing uses.

So upon a conveyance operating to transfer the legal estate, with a declaration of the use to A. and his heirs after four years, or after the death of the grantor, or to the use of the heirs of A. after the death of A., such uses are good springing uses (*k*). But though the uses are deferred, the conveyance of the seisin to serve the uses must be immediate, because a freehold cannot be conveyed *in futuro* by any mode of conveyance operating only at common law (*l*).

Examples of shifting uses occur,—if land be conveyed to the use of A. and his heirs, and if B. should pay him a certain sum, then to the use of B. and his heirs;—or to the use of A. and his heirs, and if he should not pay a certain sum of money to B. at an appointed time, then to the use of B. and his heirs;—the

Examples of shifting uses. On payment or non-payment of money.

(*e*) *Doe v. Whittingham*, 4 Taunt. 20; *Doe v. Prince*, 20 L. J. C. P. 223. See 1 Sanders, Uses, 141.

(*f*) Sugden's note to Gilbert, Uses, p. 152; Sugden, Powers, 26. Springing or shifting uses, which are left to future appointment, are known as Powers, and are treated hereafter in a separate section; see *post*, p. 269.

(*g*) Bacon, Uses, 63; Rowe's note (*i*),

Ib.

(*h*) *Osman v. Sheafe*, 3 Lev. 370; *Parsons v. Mills*, 2 Roll. Abr. 786.

(*i*) *Roe v. Tramarr*, Willes, 682; *Doe v. Whittingham*, 4 Taunt. 20. See Sanders, Uses, 142.

(*k*) *Davies v. Speed*, Salk. 675; Sanders, Uses, 142, 144.

(*l*) Sanders, Uses, 142. See *ante*, p. 91.

uses limited to B. are good shifting uses, which arise and vest in defeasance of and substitution for the estate previously vested in A. (*m*).

On marriage. A common example of shifting uses occurs in marriage settlements, where the uses are declared to the settlor and his heirs until the marriage, and from and after the marriage to the uses of the settlement (*n*).

On failure of issue. Where the uses are declared to A. and his heirs, and in case of failure of his issue at his death, or if he should die without issue in the lifetime of B., or upon failure of his issue within any other definite period (not being too remote), then to other uses, the uses over are good shifting uses defeating the fee previously limited to A. But a limitation over upon the failure of issue of A. indefinitely would be void for remoteness, unless the limitation over could take effect as a remainder after the estate tail of A. (*o*).

On succeeding to other estates, etc. Where estates are limited in a settlement with a direction that in certain specified events, they shall cease and go over to the use of other persons; as if the tenant in possession under the settlement shall become entitled or succeed to some other settled estate, or title (*p*);—or if he shall refuse or neglect to take the name and arms of the settlor (*q*);—or if he shall refuse or neglect to reside upon the estate (*r*);—the limitations over in all such cases operate by way of shifting uses (*s*).

Resulting use until springing use takes effect. Where a future use is limited as a springing use without any preceding limitation of the use, whether in a conveyance operating with or without transmutation of possession, then until the springing use takes effect, the use results to or remains in the grantor for an estate commensurate with his original estate, and not for a particular estate only. The springing use thus operates upon the resulting use in the same manner as a shifting use does upon the preceding limitation, and does not operate by way of remainder (*t*). And accordingly, where a man seised in fee by

(*m*) Sanders, Uses, 149; Fearn, Cont. Rem. 274.

(*n*) Hayes Conv. 55, n. (47); Davidson, Conv. Vol. III., Part I., p. 271. See *Chapman v. Bradley*, 4 De G. J. & S. 71.

(*o*) *Fitzgerald v. Leslie*, 3 Bro. P. C. 154; *Dansey v. Dansey*, 4 M. & S. 61; *Morgan v. Morgan*, L. R. 10 Eq. 99. See *post*, Sect. V. "Rule against Perpetuities," p. 316.

(*p*) *Cope v. Delawarr (Earl)*, L. R. 8 Ch. 982; 42 L. J. C. 870; *Meyrick v. Mathias*, L. R. 9 Ch. 237; 43 L. J. C. 521; *Law Union and Crown Insc.* v.

*Hill*, [1902] A. C. 263; 71 L. J. C. 602.

(*q*) *Doe v. Yates*, 5 B. & Ald. 544; *Re Greenwood*, [1903] 1 Ch. 749; Fearn, Cont. Rem. 254, n. (*e*).

(*r*) See *Johnson v. Foulds*, L. R. 5 Eq. 268; 37 L. J. C. 260.

(*s*) As to provisos for cesser in such cases, see *ante*, p. 163.

(*t*) 1 Hayes Conv. App. II. on the statute of Uses, 2, 465; Rowe's note (137) to Bacon, Uses, p. 63; 1 Sanders, Uses, 143; Sugden's note to Gilbert, Uses, 161; Sugden, Powers, 32. See *ante*, p. 83.

deed limits the use to the heirs of his body, without any express preceding limitation, that does not create a springing use, but gives the grantor a vested estate in tail (*u*). This decision has sometimes been regarded as anomalous, but indeed it is a logical application of the foregoing rule, that the estate which results to the grantor is not a particular estate. For admitting that the words "heir of the body" primarily describe a person claiming under another in the chain of descent, and not by purchase (*x*), we have a limitation to a person who answers that description under the resulting use in fee simple to the grantor; consequently the words are in this event redundant and inoperative.

Limitation of the use to the heirs of the body of the grantor.

Upon a conveyance in fee to the use of the heirs of the body of A. and for want of such issue to the heirs of A., it was held that no such limitation of the use for life could be implied in favour of A., not being the grantor; that the limitation of the use to the heirs of the body of A. being limited *in presenti* and not *after the death* of A. was void; and that the ultimate limitation of the use to arise after the indefinite failure of issue was void as being too remote (*y*).

Limitation of the use to the heirs of the body of A.

Where a future use is limited after a preceding limitation of the use, if the future limitation may take effect as a remainder, it is to be so taken, and becomes subject, as a remainder, to the rules of the common law; and though in the event it fail as a remainder, it cannot be supported as a springing use (*z*). Thus where a settlement was made to the use of A. for life with remainder to the use of the children living at the death of the survivor of A. and B., it was held that as, if A. survived, the children would have taken by way of remainder, the limitation must be construed as a remainder and not as a springing use, and therefore, as B. in fact survived, the limitation, being still in contingency when the particular estate determined by the death of A., failed altogether (*a*).

Limitation of future use construed as a remainder if possible.

(*u*) *Pibus v. Mitford*, 1 Vent. 372; *Wills v. Palmer*, 5 Burr. 2615. And see 1 Sanders, Uses, 143.

(*v*) See *ante*, p. 247.

(*y*) *Davies v. Speed*, Show. P. C. 104; 2 Salk. 675; 12 Mod. 38. The reports of this case are at variance and full of errors, consequently the above statement of the decision is rather conjectural. See the remarks on this case in Sugden's Gilbert, Uses, 162; Sugden, Powers, 33; 1 Sanders, Uses, 144; Rowe's note (130) to Bacon on Uses. And see *post*, p. 316, "Rule against Perpetuities."

(*z*) *Hawes v. Hawes*, 14 Ch. D. 614; *White v. Summers*, [1908] 2 Ch. 256;

77 L. J. C. 506.

(*a*) *Hole v. Escott*, 2 Keen, 444; 4 M. & Cr. 187; the marginal note in the latter report does not state the limitations correctly. And see *Goodtitle v. Billington*, Dougl. 753, 758; *Carwardine v. Carwardine*, 1 Eden, 27; Fearn, Cont. Rem. 388. But in the case of *Hole v. Escott* it was further decided that a power of appointing uses, after a use limited for a particular estate, might be well executed after the determination of the particular estate, and the uses would take effect as springing uses from the time of appointment, see *post*, "Powers," p. 270.

Upon this principle where lands were conveyed in fee to the use of the grantor for a term of years, if he should so long live, with remainder to the heirs of his body, the limitation to the heirs of his body was held void, as being a contingent remainder to the person answering that description, without an estate of freehold to support it (*b*); for the express limitation of the use to the grantor for a term of years excluded the implication of an estate to him for his life.

Limitation for life of grantor implied from limitations of the use at his death.

But where upon a conveyance in fee the uses were limited to A. for a term of years, if the grantor should so long live, and after the death of the grantor to the use of others for freehold estates, it was held that the grantor had an estate for life by implication, in order to support the future limitations of the freehold as remainders, there being nothing in the express limitation of the term of years to another person to prevent such implication (*c*). So where the uses were limited to A. for life with remainder to the heirs of the body of the grantor, it was held that the grantor took a vested estate tail in remainder, by an implied limitation of the use to him for life after the determination of A.'s life estate (*d*).

Future use which cannot take effect as remainder.

If the future use, though following a particular estate, be not limited by way of remainder, nor could take effect in any event as a remainder, as if the use be limited to A. for life, and after his death and one year or one day to the use of his children or the children of B., it seems that such future limitation, though void at common law, might operate effectually as a springing or shifting use (*e*). Such limitations are good by way of executory devise (*f*).

(*b*) *Adams v. Savage*, 2 L. Raym. 855; 2 Salk. 680. *Rawley v. Holland*, 22 Vin. Abr. 189. "In these cases it was solemnly decided that a use limited by way of remainder shall not be construed a springing use, although actually void in its creation if not so considered. Upon principle certainly it would seem that the limitations to the heirs of the body, in these cases, were good springing uses, unless indeed it be objected to them that they were limited *per verba de presenti*." Sugden's note to Gilbert, Uses, 167; see *ib.* pp. 35, 176; Sugden, Powers, 36, 42; Rowe's note (130) to

Bacon, Uses; 1 Sanders, Uses, 147. And see *ante*, p. 236.

(*c*) *Penhay v. Hurrell*, 2 Vern. 370; 2 Freeman, 235, 258; cited and explained in Sugden's note to Gilbert, Uses, 169; Sugden, Powers, 37.

(*d*) *Wills v. Palmer*, 5 Burr. 2615; 2 W. Bl. 687, explained in Fearn, Cont. Rem. 44. See *ante*, p. 254.

(*e*) See *ante*, p. 230; 1 Spence Eq. Jur. 482, adopting the opinion stated in Hayes Convey. 120, 5th ed.

(*f*) Fearn, Cont. Rem. 398; 1 Jarman, Wills, 823; *post*, p. 262.



## SECTION III. FUTURE DEVISES.

Devises by way of remainder—application of the rule in *Shelley's* case.

Executory devises.

Executory devise not preceded by estate of freehold—examples—freehold subject to the executory devise passes to the heir or residuary devisee.

Executory devise before determination of preceding estate—examples—effect in divesting preceding estate.

Executory devise after determination of preceding estate.

Alternative executory devises.

Future devise construed as remainder, if possible—remainder or executory devise according to events at or after testator's death.

Devise construed in favour of vesting—words of futurity referred to the possession rather than vesting—words of contingency referred to divesting rather than vesting—constructions restricting contingency—constructions extending contingency.

Devise to children—to after-born children—future devise to children—child *en ventre sa mère*—illegitimate children.

Future estates and interests in land taking effect under the power of disposition by will are either by way of remainder as at common law or executory devise; the latter having been defined as “a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder” (*a*). As will hereafter appear, one and the same limitation may, according to the circumstances, operate as a contingent remainder or an executory devise (*b*).

Remainders and executory devises.

A devise by way of remainder is regulated by the rules of common law. Accordingly, the devise of a contingent remainder must vest before or at the determination of the particular estate; if it do not so vest, it fails altogether, and cannot afterwards be supported as an executory devise, unless saved by the Contingent Remainders Act, 1877, 40 & 41 Vict. c. 33 (*c*)—thus, where a devise was made to A. for life, with remainder to B. for a term of years if he should so long live, and after the deaths of A. and B. to the heirs of the body of B., it was held that the devise over to the heirs of the body of B., being a contingent remainder, failed by the death of A. before B., by which event the preceding freehold estate was determined before the remainder had become vested (*d*).—So, where the devise was to A. for life and after his

Devise of remainders regulated as at common law.

(*a*) Jarman, Wills, 822; according to Fearn, Ex. Dev. 386, “an executory devise is such a limitation of a future estate or interest in lands, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.” As to

the power of disposition by will, see *ante*, p. 59.

(*b*) See *post*, p. 263.

(*c*) *White v. Summers*, [1908] 2 Ch. 256; 77 L. J. C. 506.

(*d*) *Doe v. Morgan*, 3 T. R. 763. See *ante*, p. 236.

death to the children of A. who should attain twenty-one, it was held that the devise to the children failed upon the death of A., leaving a child who did not attain that age until afterwards (*e*); and that a devise over if there should be no such child, being also a contingent remainder, failed under the same circumstances (*f*).

Application of  
the rule in  
*Shelley's* case.

The rule in *Shelley's* case applies to limitations of remainders to *heirs*, or *heirs of the body* (or similar expressions), of a person to whom an estate of freehold is devised, in the same manner as if the limitations were contained in a conveyance at common law; and for this purpose a will and a subsequent codicil are regarded as one instrument (*g*). Accordingly, where land was devised to A. for life, with remainder to his first and other sons successively in tail, with remainder to the heirs of A., and A. died in the lifetime of the testator, it was held that the devise of the ultimate remainder lapsed and his heir took nothing, the word heirs being used as a word of limitation and not of purchase (*h*).

The rule has a wider scope in wills than in deeds, because in wills many words are capable of being used as equivalents of "heirs" or "heirs of the body," such as "issue," "children," and the like, to which, when so construed, the rule equally applies (*i*). Also in wills the limitation to the heirs of the body is sometimes implied, as on a devise to A. for life with a devise over upon failure of heirs of his body (*k*).

The rule does  
not apply to  
executory  
devises.

But the rule does not apply to executory devises which are limited to take effect in substitution or independently of the preceding estate, and not by way of remainder (*l*).

The rule is  
not depend-  
ent upon  
intention of  
testator.

The application of the rule in *Shelley's* case to wills is independent of any expressions of intention which do not enter into and affect the limitations upon which it operates. Intention rules and controls the separate limitations; but it cannot prevent or reach the legal consequences resulting from the limitations used. Accordingly where the will is construed as intending an estate of freehold to the ancestor, with a subsequent devise to his heirs in succession according to the regular course of descent, whether general or special, the rule applies and the heirs take only by descent, for the devise to the heirs cannot otherwise take effect in

(*e*) *Holmes v. Prescott*, 33 L. J. C. 264. See *White v. Summers*, [1908] 2 Ch. 256; 77 L. J. C. 506.

(*f*) *Perceval v. Perceval*, L. R. 9 Eq. 386.

(*g*) *Hayes v. Foarde*, 2 W. Bl. 698. See *Douglas Menzies v. Umphelby*, [1908] A. C. 224; 77 L. J. P. C. 64. And see *ante*, p. 247.

(*h*) *Doe v. Colyear*, 11 East, 548; *Goodright v. Wright*, 1 P. Wms. 397; *Hodgson v. Ambrose*, Dougl. 336.

(*i*) *Doe v. Rucastle*, 8 C. B. 876. And see *ante*, pp. 137 *et seq.*

(*k*) See *ante*, p. 135.

(*l*) See *post*, p. 260; as is the case with shifting uses, *ante*, p. 253.

the course intended. And where the grounds for the application of the rule thus exist, no expression of an intention to exclude the rule can prevail. Expressions to the effect that the ancestor shall take for life *only*, or for life and *not otherwise*, and the like, or express restrictions of his power of alienation, are immaterial as regards the application of the rule, and are inoperative to exclude it (*m*).

Expressions restricting the estate of the ancestor.

If to a devise in remainder to the heirs there be added words of limitation, as a devise to the heirs of the body and *to the heirs of the body of such heirs*, or to the heirs of the body *and to their heirs*, or to the heirs of the body *in tail*, the superadded words of limitation will be treated as superfluous, and, so far as they are inconsistent with the course of descent imported by the prior words, will generally be rejected as repugnant, and do not exclude the application of the rule (*n*).

Devise to the heirs with words of limitation.

So if the devise to the heirs be accompanied with words of distribution or other expressions inconsistent with an estate by descent, as a devise to the heirs or heirs of the body *in equal shares*, or *as tenants in common*, or *in such shares as the ancestor shall appoint* or the like, such expressions are rejected as repugnant (*o*).

With words of distribution.

But if it appear from the context of the will that in devising to the heir, or heirs of the body, the testator does not use those words in their technical meaning of a succession of persons in the regular course of descent, the rule has no application. Thus, it may appear from the will that they are used to mean children or sons only (*p*);—so a devise to the heirs of A., “as if she had continued sole and unmarried,” excludes all the lineal issue (*q*);—in such cases the conditions of the rule do not exist, and the persons designated by the word “heirs” take as devisees.

Devise to heirs with meaning explained by context.

If the devise over be to the “heir” or “heir of the body” in the singular number with words of limitation superadded;—as to the heir and to the heirs of such heir (*r*),—to the heir male and to the heirs of such heir male (*s*),—to the heir male and to the heirs male of the body of such heir male (*t*),—to the heir for

Devise to “heir” with words of limitation.

(*m*) See *Coulson v. Coulson*, 2 Atk. 245; 2 Stra. 1125; *per* Cockburn, C. J., *Jordan v. Adams*, 9 C. B. N. S. at p. 497; *per* Ld. Macnaghten, *Van Grutten v. Foxwell*, [1897] A. C. at p. 667; *Fearne*, Cont. Rem. 188–199. And see *ante*, pp. 247, 248.

(*n*) *Roe v. Bedford*, 4 M. & S. 362; *Douglas v. Congreve*, 1 Beav. 59; 4 Bing. N. C. 1. And see pp. 135, 247, and the cases there cited.

(*o*) See *ante*, p. 136, and the cases there cited.

(*p*) *Jordan v. Adams*, 9 C. B. N. S. 483; see *ante*, pp. 136, 137.

(*q*) *Brookman v. Smith*, L. R. 7 Ex. 271; 41 L. J. Ex. 114.

(*r*) *Clark v. Day*, Moor, 593.

(*s*) *Willis v. Hiscox*, 4 M. & Cr. 197; *Chamberlayne v. Chamberlayne*, 6 E. & B. 625; 25 L. J. Q. B. 187, 357.

(*t*) *Archer's Case*, 1 Co. 66.

life(u);—in all these cases the word heir becomes a word of purchase and the rule does not apply.

Executory devise.

An executory devise being the limitation by will of a future estate or interest in land, which cannot take effect as a remainder, it follows that “every devise of a future interest, which is *not preceded* by an estate of freehold created by the same will, or which, *being so preceded*, is limited to take effect *before* or *after* and *not at the expiration* of such prior estate of freehold is an executory devise”(x).

Executory devise not preceded by estate of freehold.

Examples of executory devises not preceded by an estate of freehold occur;—in a devise to A. to take effect six months after the death of the testator, or after the death of any other person living at the testator's death,—or a devise to A. when he shall attain the age of twenty-one years, such devises, though limiting a freehold to commence *in futuro*, are valid (y).

The above devises are executory or future by the express terms of limitation; but a devise may also be executory from the devisee not being ascertained,—as a devise to the children of A., A. having no child at the death of the testator,—or a devise to the heirs or heirs of the body of A. after the death of A. (z).

Executory devise subject to term of years.

The devise of a preceding estate not of freehold has no effect upon the construction or operation of an executory devise, which takes effect according to the terms of limitation, subject only to the term, if it be then existing. As a devise to A. for a term of years, if he shall so long live, and after his death to the heirs of the body of A.; the limitation to the heirs, which would be void at common law as a contingent limitation without a vested freehold estate to support it, is valid as an executory devise (a).

Freehold subject to executory devise passes to heir or residuary devisee.

Where there is an executory devise without any preceding disposition of the freehold, the inheritance descends to the heir, who will take the intermediate rents and profits until the executory devise takes effect if undisposed of (b); or it will pass under a residuary devise (c). Where, however, real and personal estate is given together, the person entitled under an executory gift

(u) *White v. Collins*, Com. 289.

(x) 1 Jarman, Wills, 822; see *ante*, p. 257. “Where a future interest without a preceding estate, or a contingent interest unsupported by any preceding freehold, or any estate after a preceding vested fee simple, is limited by devise; such limitation, as it cannot be good as a remainder, may take effect as an executory devise,” Fearn, Ex. Dev. 395.

(y) See *ante*, p. 50; Fearn, Ex. Dev. 395; 1 Jarman, Wills, 823; *Doe v. Hutton*, 3 B. & P. 643.

(z) See *ante*, p. 235; Jarman, Wills, *supra*; *Rogers v. Gibson*, 1 Ves. sen. 485.

(a) See *ante*, p. 236; 1 Jarman, Wills, 823; *Gore v. Gore*, 2 P. Wms. 28; *Harris v. Barnes*, 4 Burr. 2157; 1 Bl. 643. The like limitation of a springing use is void, see *ante*, p. 255.

(b) *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Doe v. Hutton*, 3 B. & P. 643; *Doe v. Timins*, 1 B. & Ald. 530.

(c) *Stephens v. Stephens*, Cas. t. Talb. 228; *Wealthy v. Bosville*, Cas. t. Talb. 258; *Rogers v. Gibson*, 1 Ves. sen. 485.

takes the intermediate rents and profits of the real estate upon becoming entitled in possession (*d*).

Examples of executory devises preceded by a devise of the freehold, but taking effect *before* the expiration of the preceding estate and therefore divesting that estate, occur :—upon a devise to A. and his heirs, with a devise over if he die under twenty-one (*e*),—upon a devise to A. and his heirs, with a devise over if he die under twenty-one, or any other age, and without issue ; or with a devise over upon death under a given age, *or* without issue, in which case the word “or” is construed to mean “and” (*f*),—or upon a devise to A. and his heirs, with a devise over if he die without issue living at his death, or if his issue fail within any other definite time, not being too remote (*g*).

Executory devise divesting preceding estate.

Devise over upon death under 21, and without issue.

Devise over upon failure of issue.

So upon a devise to A. for life, or in tail, with a clause or proviso that in case A. shall become entitled to a certain other settled estate (*h*),—or in case A. shall neglect to take the name and arms of the testator (*i*),—or in case he shall neglect to reside upon the land, or the like, the estate shall go over to B. (*k*),—the estate then shifts upon the event specified by executory devise.

Devises with shifting clause.

The devises over in the above cases are good executory devises, though limitations thus operating to defeat and shift the preceding freehold are void in conveyances at common law (*l*). The only difference between these executory devises and those before mentioned as not preceded by an estate of freehold, is “that in one case the property shifts, on the happening of the contingency, from the prior devisee, and in the other, from the heir of the testator, to the devisee of the executory interest” (*m*).

Effect in divesting preceding estate.

The preceding estate is divested by the executory devise only to the extent of the estate thereby limited. Thus, if a devise be

Divesting preceding estate in part only.

(*d*) *Genery v. Fitzgerald*, Jac. 468 ; *Ackers v. Phipps*, 3 Cl. & F. 665 ; *Re Burton's Will*, [1892] 2 Ch. 38 ; 61 L. J. C. 702.

(*e*) *Stephens v. Stephens*, Cas. t. Talb. 228. As to a devise to A. and his heirs, with a devise over “if he die,” see *post*, p. 266.

(*f*) *Right v. Day*, 16 East, 67 ; *Fairfield v. Morgan*, 2 Bos. & P. N. R. 38 ; *Grey v. Pearson*, 6 H. L. C. 61 ; 26 L. J. C. 473. And see *Mortimer v. Hartley*, 6 Ex. 47 ; S. C. 3 De G. & Sm. 316.

(*g*) *Porter v. Bradley*, 3 T. R. 143 ; *Doe v. Webber*, 1 B. & A. 713 ; *Doe v. Frost*, 3 B. & A. 546. See *Doe v. Spratt*, 5 B. & Ad. 731 ; and see *post*, p. 324.

(*h*) See *Monypenny v. Dering*, 2 De G. M. & G. 145 ; 22 L. J. C. 313 ; *Harrison v. Round*, 2 De G. M. & G. 190 ; 22 L. J. C. 322. And see *Meyrick v. Laws*, L. R. 9 Ch. 237 ; 43 L. J. C. 521.

(*i*) *Langdale (Lady) v. Briggs*, 8 De G. M. & G. 391 ; 26 L. J. C. 27 ; *Blaygrove v. Bradshaw*, 4 Drew. 230. See *Re Cutt's Trust*, 2 H. & M. 46 ; 33 L. J. C. 495.

(*k*) *Dunne v. Dunne*, 7 De G. M. & G. 207. See *Doe v. Clarke*, 8 East, 185 ; *Partridge v. Partridge*, [1894] 1 Ch. 351 ; 63 L. J. C. 122.

(*l*) See *ante*, p. 33.

(*m*) 1 Jarman, Wills, 824.

Substitution  
of less estate.

made in fee, with a devise over in a certain event to another for life, the prior devise is divested only to the extent of the life estate; but if the executory devise for life were limited to the same devisee to whom the fee is originally given, it would seem to be intended and to be construed as divesting the fee altogether and substituting a life estate, as where a testator devised to his daughter in fee, and that if she married without the consent of a certain person, she should have an estate for life only (*n*).

Devise over  
failing in  
effect.

If the executory devise fail of taking effect or be or become void from any cause, as where the objects of such devise never come into existence, or where the event upon which it is limited to arise is too remote, or in fact never happens, or is or becomes impossible, the preceding estate continues according to its original limitation or destination (*o*); but if the executory devise fail by lapse, or death of the object before the testator, all other conditions having been satisfied, the estate passes to the heir or residuary devisee (*p*).

Effect of de-  
vise over as  
conditional  
limitation of  
preceding  
estate.

A devise over limited to take effect in a specified event may operate by construction as a conditional limitation of the preceding estate determining it in the event specified, though it fail in effect in carrying the estate over by way of executory devise (*q*).

Executory  
devise after  
determination  
of preceding  
estate.

A devise of a future estate limited to take effect *after* the determination of a preceding estate may operate effectually as an executory devise;—thus upon a devise to A. for life, and after his death *and one day* (or any other period of time) to B., or to the children of B., the devise to B. or his children is a good executory devise, though such a limitation would be void at common law. A devise to A. for life and after his death to the children of B., B. as yet having no child, would be a contingent remainder.—The freehold, with the intermediate rents and profits, after the determination of the preceding estate until the executory devise takes effect, vests in the residuary devisee, if any, or if not, in the heir (*r*).

Alternative  
executory  
devises.

Several executory devises, though including the whole interest, may be made by way of alternative limitations, so that any one of

(*n*) 1 Jarman, Wills, 824 *et seq.*; *Wright v. Wright*, 1 Ves. sen. 409.

(*o*) *Jackson v. Noble*, 2 Keen, 590; *Gatenby v. Morgan*, 1 Q. B. D. 685.

(*p*) *Turbuck v. Turbuck*, 4 L. J. N. S. Ch. 129; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388. See *Brookman v. Smith*, L. R. 7 Ex. 271; 41 L. J. Ex. 114.

(*q*) *Doe v. Eyre*, 5 C. B. 713; *Robinson v. Wood*, 27 L. J. C. 726; *Hurst v. Hurst*, 21 Ch. D. 278.

(*r*) *Stephens v. Stephens*, Cas. t. Talb. 228; *Re Wrightson*, [1904] 2 Ch. 93; 73 L. J. C. 742. See *ante*, p. 33. See as to springing uses arising after a preceding estate, *ante*, p. 256.

them may take effect if the others preceding it fail ; but upon one of such executory limitations taking effect and vesting the whole interest indefeasibly, then all the subsequent limitations become void and inoperative(s). The limitations may operate as a remainder, vested or contingent, in one alternative, and as an executory devise in the other (t).

Devises of future estates are construed as remainders, if they are capable of that construction, and not as executory devises ; and when so construed are consequently liable to fail by the determination of the preceding freehold before they become vested (u).

Future devise construed as remainder, if capable.

Thus, if there be a devise to A. in tail with a devise over, if he die without leaving issue at his death, or upon failure of his issue within other definite time, the devise over is a contingent remainder, and not an executory devise, because the event on which it depends, namely, the failure of issue, determines the prior estate tail (x).—Upon a like principle, upon a devise to A. and to his heirs, with a devise over upon the failure of issue of A. indefinitely, the devise to A. is restricted to an estate tail, and the devise over takes effect as a remainder, and not by way of executory devise, for as such, being postponed until an indefinite failure of issue, it would be void for remoteness (y). So in the case of a devise to A. for life, with a devise over upon the failure of issue of A. indefinitely, A. takes an estate tail by implication, and the devise over is a remainder (z).

Devise to A. in tail with devise over on death without issue.

In accordance with this rule of construction, where a devise was made to A. and to the heirs of his body, and “if he die” then over, the devise over was read as “if he die without issue,” and was construed to be a remainder expectant upon the estate tail (a).

To A. in tail with devise over if he die.

As a will takes effect from the death of the testator a devise, which in terms is a contingent remainder, by reason of events

Remainder or executory devise according to events at or after testator's death.

(s) Fearn, Ex. Dev. 514, and the cases there cited ; see Butler's note, ib. ; *Stephens v. Stephens*, Cas. t. Talb. 228.

(t) See *Evers v. Challis*, 7 H. L. C. 531 ; 29 L. J. Q. B. 121 ; *Doe v. Fonnereau*, Dougl. 487 ; *Doe v. Howell*, 10 B. & C. 191.

(u) *Purefoy v. Rogers*, 2 Wms. Saund. at p. 781 ; and see cases collected ib. n. (9). See also *Doe v. Owens*, 1 B. & Ad. 318 ; *Re Ashforth*, [1905] 1 Ch. 535 ; 74 L. J. C. 361. The same rule applies to future uses, see *ante*, p. 255.

(x) See *ante*, p. 235.

(y) See *ante*, p. 138 ; *post*, p. 323.

(z) See *ante*, p. 235 ; as to what expressions in a will import an indefinite failure of issue, and the effect of the statute 1 Vict. c. 26, s. 29, in restricting such expressions, see *ante*, p. 139.

(a) *Anon.*, 1 And. 33 ; *Spalding v. Spalding*, Cro. Car. 185 ; *Doe v. Daere*, 1 Bos. & P. 250, affd. nom. *Daere v. Doe*, 8 T. R. 112. And see *Eastwood v. Lockwood*, L. R. 3 Eq. 487 ; 36 L. J. C. 573, and cases there cited. As to a devise to A. and his heirs, and if he die or in case of his death, then over, see *post*, p. 265.

occurring in the lifetime of the testator since the date of the will, may become in the result an executory devise.—Thus upon a devise to A. for life with a devise over after his death to the children of B., the devise over is a contingent remainder whilst A. lives, and until B. has a child; but if A. die in the lifetime of the testator, and B. have no child at the death of the testator when the will takes effect, the devise is executory to his future children, as if originally limited to them without the preceding estate. And conversely, a limitation in a will which at the time of making it could only have operated by way of executory devise, may by change of circumstances in the testator's lifetime operate at his death so as to give a vested estate in possession, or a vested remainder, or a contingent remainder (*b*).—Also “a change of circumstances after the testator's death, may change the character of a particular limitation, and make it operate at one time as a remainder, at another as an executory devise; and *e converso* at one time as an executory devise, at another as a remainder.” But a limitation which has once operated as a remainder can never, after the death of the testator, be changed into an executory devise (*c*).

Devise construed in favour of vesting—words of futurity referred to time of possession, and not to the vesting.

Upon the general principle of construction in favour of vesting estates, words of futurity are referred to the time of possession rather than to the vesting in interest,—thus a devise to A. until B. shall attain twenty-one, and *when* B. attains that age, or *at* or *from* or *after* attaining that age to B. in fee, is construed as giving B. an immediately vested estate subject to the term of years in A.; and not as an executory devise upon his attaining twenty-one, which would be the construction if the devise to him stood alone without the prior interest; and consequently if he die before attaining that age the fee descends to his heir (*d*).

So, a devise *after* payment of debts is not executory or future until the debts are paid, but gives an immediately vested interest, subject to a charge created for the amount of the debts (*e*).

Words of contingency referred to divesting rather than vesting the estate.

Upon the same general principle of construction, words of contingency are referred to the divesting of the estate rather than

(*b*) *Hopkins v. Hopkins*, Cas. t. Talb. 44; 1 Atk. 581; *Doe v. Roach*, 5 M. & S. 482. See *per* Kenyon, C. J., in *Doe v. Morgan*, 3 T. R. 765.

(*c*) *Hopkins v. Hopkins*, Cas. t. Talb. 44; 1 Atk. 581; *Mogg v. Mogg*, 1 Mer. 654; *Doe v. Howell*, 10 B. & C. 191; *White v. Summers*, [1908] 1 Ch. 256; 77 L. J. C. 596.

(*d*) *Boraston's Case*, 3 Co. 19; Tud. L. C. Conv. 427.

(*e*) *Carter v. Barnardiston*, 1 P. Wms. 505; and see cases *ante*, p. 155, n. (*d*). Upon a devise in fee for payment of debts, with a devise over to another when the debts are paid, the devise over seems to be executory, at least as to the legal estate; and as to whether it may not infringe the rule against perpetuities, see Lewis on Perpetuities, c. xxx. *Bateman v. Hotchkin*, 10 Beav. 426.



to the vesting, and are construed as conditions subsequent rather than precedent. Accordingly a devise to A. *if* or *when* he shall attain a given age, followed by a devise over in case he die under that age, is construed as giving an immediate vested estate, subject to be divested by the executory devise over taking effect; and not as an executory devise upon his attaining that age, the words of contingency being restricted to the event of the devise over taking effect (*f*).

But this construction yields to other expressions in the will of an intention that the estate shall not be vested. And where the contingency enters into the description of the devisee, the devise may be necessarily contingent and executory; as if it be to *such* child or children of A. as shall attain twenty-one, or to the children *who* shall attain twenty-one, only such person or persons can take as eventually answer to the description (*g*).

An executory devise is construed strictly, relatively to the preceding estate, or against divesting it.—The following rules seem to be founded in great measure upon this principle of construction. Upon a devise to A. in fee simple in possession, and “if he die” or “in case of his death” to B., the devise over is restricted to death in the lifetime of the testator, in order to satisfy the expression of contingency, and if A. survive the testator his estate is absolute (*h*).

Constructions restricting contingency.

Devise to A. in fee, and if he die, to B.

If the devise be to A. for life only, and if he die to B., the devise to B. is a vested remainder after the life estate of A., and is not restricted to the death of A. in the lifetime of the testator (*i*).—And if the devise be to A. in tail and “if he die” to B., the words “without issue” are supplied, and the devise to B. is a vested remainder expectant upon the estate tail (*k*).

To A. for life or in tail, and if he die, to B.

If the event of death is coupled with an express contingency as “if A. die without leaving a child,” no presumption is required to satisfy the contingent expression, and it would be an unnecessary restriction of the words of the will to construe the condition with reference only to the death of the testator; the devise over

To A. and if he die without leaving child.

(*f*) See *ante*, p. 178, n. (*u*), p. 179, n. (*y*).

(*g*) *Festing v. Allen*, 12 M. & W. 279; 13 L. J. Ex. 74; *White v. Summers*, [1908] 2 Ch. 256; 77 L. J. C. 506. *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. C. 191, a devise to the children of B., “if he leave any him surviving, but in case he leave no child him surviving” then over, held to be contingent to such children as survived.

(*h*) *Edwards v. Edwards*, 15 Beav.

357; 21 L. J. C. 324. See *Randfield v. Randfield*, 8 H. L. C. 225.

(*i*) See *Hodgson v. Ambrose*, 1 Doug. 337; *Denn v. Bagshaw*, 6 T. R. 512; *Doe v. Ewart*, 6 A. & E. 636; *White v. Summers*, [1908] 2 Ch. 256; 77 L. J. C. 506. A devise to A., without words of limitation, and in case of his death to B., before the Wills Act, had the same construction. See *ante*, p. 146.

(*k*) *Anon.*, 1 And. 33; *Spalding v. Spalding*, Cro. Car. 185.

upon such contingency takes effect upon the death of A. without leaving a child, whenever that event may happen (l).

Devise to A.  
at future time  
or event, and  
if he die, to B.

If the devise to A. be limited to take effect at a future time or event, as if he shall attain a certain age, with a devise over in case of his death, or in case of his death without leaving children, or leaving children, or the like, the devise over is restricted to his death before the time or event specified for the devise to A. to take effect (m). Upon the same principle where a testator devised to such of his daughters as should attain twenty-one or marry, with a proviso that on the marriage of any daughter, a moiety of her share should be settled upon her and her children, the proviso was construed to apply only on marriage before twenty-one and on attaining twenty-one the shares vested absolutely (n).—A devise to A. in remainder expectant upon a preceding estate for life or other particular estate, with a devise over in case of his death, or in case of his death without leaving children or issue or the like; the gift over takes effect upon the happening of the contingency, whether before or after the determination of the preceding estate (o).

Devise over  
upon death  
“without  
leaving  
children” re-  
stricted to  
without  
having  
children.

Upon the same principle of construction against divesting a prior vested estate, (applied especially in favour of provisions for children,) where a devise is made to children absolutely or without reference to surviving the parent, with a devise over upon the death of the parent “without leaving children,” the devise over is restricted to the case of death “without having had children,” in order that the estates limited to the children may not be divested, where the context admits of this construction (p).

Constructions  
extending  
contingency.

On the other hand, executory devises are sometimes extended to include events manifestly within the meaning though not within the expressions of the will as to the contingency upon which they are to take effect.—Thus, upon a devise to children with a devise over in case all such children should die under twenty-one, is extended impliedly to the case of there being no children (q).—So, a devise over in case of a prior devisee having

Devise over  
on death of  
children  
under 21 ex-  
tended to case  
of no children.

(l) *Edwards v. Edwards*, 15 Beav. 357; *Else v. Else*, L. R. 13 Eq. 196; 41 L. J. C. 213; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, L. R. 7 H. L. 408.

(m) *Home v. Pillons*, 2 M. & K. 15; *Clark v. Henry*, L. R. 6 Ch. 588. See *Re Schnadhorst*, [1902] 2 Ch. 234; 71 L. J. C. 454.

(n) *Re Dowling's Trusts*, L. R. 14 Eq. 463.

(o) *O'Mahoney v. Burdett*, L. R. 7

H. L. 388; *Ingram v. Soutten*, L. R. 7 H. L. 408; *Re Schnadhorst*, [1902] 2 Ch. 234; 71 L. J. C. 454.

(p) *White v. Hill*, L. R. 4 Eq. 265, and cases there cited; *Brown's Trusts*, L. R. 16 Eq. 239; 42 L. J. C. 84. See *Re Bull*, 40 Ch. D. 11; 58 L. J. C. 232.

(q) *Mendous v. Parry*, 1 V. & B. 124; *Mackinnon v. Sewell*, 5 Sim. 78; 2 My. & K. 202. See *Evors v. Challis*, 7 H. L. C. 531; 29 L. J. Q. B. 121; *Re Bence*, [1891] 3 Ch. 242.

but one child was held to extend to the case of not having any child (r).—But upon a devise over in case of the death of all of children under twenty-one, where there was a child at the date of the will who lived to attain twenty-one but died before the testator, it was held that the devise over must be taken according to the terms of the will and therefore never took effect (s).

Upon the same principle of construction in favour of vested estates, a devise to the children of A. or to all the children of A., without any preceding estate, or postponement of possession, *primâ facie* vests in the children living at the death of the testator only, to the exclusion of after-born children (t); but if there are no children in existence at the testator's death the devise is taken to be executory to all after-born children (u).—If the terms of the devise be to all the children "to be born," or "to be begotten," it extends *primâ facie* to after-born children (x). At the same time such words, and even the expression "hereafter to be born or begotten," do not exclude children born before the testator's death, or even before the date of the will (y).

Devise to children.

To children "to be born," etc.

A future devise to children, whether by way of remainder or executory devise, includes all who are in existence at the period of possession; as upon a devise to A. for life and after his decease to the children of A. or to the children of B., the children living at the death of the testator take vested estates, subject to divesting *pro tanto* as others come into existence in the lifetime of A. (z). The rule extends to grandchildren, brothers, cousins, and other classes of relations, and the objects are finally ascertained at the period of possession or distribution; but it does not apply to a devise to "relations" indefinitely, without restriction to a class (a).—If there are no children in existence at the period of possession, the devise extends to all after-born children, unless it must be taken as a legal contingent remainder, in which case it would fail upon the determination of the particular estate (b).—If the devise be subject merely to a term of years or to a charge

Future devise to children.

(r) *Murray v. Jones*, 3 V. & B. 313.

(s) *Brookman v. Smith*, L. R. 7 Ex. 271; 41 L. J. Ex. 114.

(t) *Singleton v. Gilbert*, 1 Cox, Ch. 68; 1 Bro. C. C. 542, n.; *Scott v. Hurwood*, 5 Madd. 332; *Mogg v. Mogg*, 1 Mer. 654. See *Whitbread v. St. John (Lord)*, 10 Ves. 152.

(u) *Shepherd v. Ingram*, Ambler, 448. See note to *Weld v. Bradbury*, 2 Vern. 705; *Harris v. Lloyd*, Turn. & Russ. 310.

(x) *Mogg v. Mogg*, 1 Mer. 654; *Doe v. Hallett*, 1 M. & S. 124; *Locke v. Dunlop*, 39 Ch. D. 387; 57 L. J. C. 1010.

(y) *Hebblethwaite v. Cartwright*, Cas. t. Talb. 31. See *Re Pickup's Trusts*, 1 J. & H. 389.

(z) See *ante*, p. 246.

(a) *Baldwin v. Rogers*, 3 D. M. & G. 649; 22 L. J. C. 665.

(b) *Chapman v. Blisset*, Cas. t. Talb. 145. See *ante*, p. 237.

it is considered as immediate, and therefore does not let in after-born children (c).

Devise to A.  
and his  
children.

Upon the same principle a devise to A. *and his children, primâ facie*, is a gift to A. and all his children, including those, if any, born after the death of the testator (d).—If no children are then in existence, it is construed as an estate tail, in order that children may participate, according to the rule in *Wild's case* (e).—But the context of the will may require a devise to A. and to his children, he having no children at the testator's death, to be construed as giving a life estate to A. with remainder to his children (f).

Child *en ventre sa mère*  
capable of  
taking.

A child *en ventre sa mère*, who is afterwards born, is considered as existing for the purpose of taking by devise; and will take under a devise to children "born" or "living" at the death of the testator or of the parent, or at any other stated period (g).

Devise to illegitimate children.

A devise to children *primâ facie* means legitimate children; but it may appear from the express terms or the context of the will, or from the circumstances to which it is applied, to mean or to include illegitimate children, and persons answering to the description intended may take under it (h).

An illegitimate child cannot be designated by relation to the father, except as the reputed child, because no inquiry into the fact of paternity is legally admissible. The reputed relationship is a distinct matter of fact capable of being admitted by the father or otherwise established. Such child may be well designated by relation to the mother, and the maternity established by evidence. A gift by deed to future illegitimate children is, it seems, void as involving the illegal condition precedent of illicit cohabitation of the parents. So a devise to future illegitimate children of another person, at least as to such as are born after the death of the testator. But a devise to all the testator's illegitimate children or reputed children is good as to all persons answering such description at the death of the testator, though born after the date of the will (i).

(c) *Singleton v. Gilbert*, 1 Cox, 68; 1 Bro. C. C. 542, n.

(d) *Oates v. Jackson*, 2 Stra. 1172.

(e) *Wild's Case*, 6 Co. 17 a; Tud. L. C. Conv. 361.

(f) Res. in *Wild's Case*, 6 Co. 17 a; Tud. L. C. Conv. 361 and notes.

(g) *Doe v. Clarke*, 2 H. Bl. 399. See *Villar v. Gilbert*, [1907] A. C. 139; 76 L. J. C. 339; *Re Salaman*, [1908] 1 Ch. 4; 77 L. J. C. 60.

(h) *Hill v. Crook*, L. R. 6 H. L. 265;

42 L. J. C. 702; *Dorin v. Dorin*, L. R. 7 H. L. 568; 45 L. J. C. 652; *Re Horner*, 37 Ch. D. 695; 57 L. J. C. 291; *Re Harrison*, [1894] 1 Ch. 561; 63 L. J. C. 385.

(i) *Gordon v. Gordon*, 1 Mer. 141; *Orcleston v. Fullalove*, L. R. 9 Ch. 147; 43 L. J. C. 297; *Dorin v. Dorin*, L. R. 7 H. L. 568; *Re Hastie's Trusts*, 35 Ch. D. 728; *Re Frogley*, [1905] P. 137; 74 L. J. P. 72; *Re Loveland*, [1906] 1 Ch. 542; 75 L. J. C. 314.

SECTION IV. POWERS.

- § 1. Powers distinguished.
  - §§ 1. As to their source and operation.
    - 2. In connection with estates.
    - 3. As to the objects.
- § 2. Construction of powers as to the estates to be appointed and priority of operation.
- § 3. Execution of powers.
  - §§ 1. Time of execution.
  - 2. Form and conditions of execution.
  - 3. Construction and operation of instrument of execution.
  - 4. Execution in excess of power.
- § 4. Equitable jurisdiction over powers.
  - §§ 1. Jurisdiction in aid of execution.
  - 2. Jurisdiction to set aside or control execution

The extensive subject of powers is with difficulty compressed into the space here allotted; but it is not the purpose of the present work to do more than digest the principal heads of the subject, which has been done in the order given above. The last edition of Lord St. Leonards' book on Powers is generally referred to throughout this section as sufficient authority for most of the propositions, supplemented by a reference to the leading cases and the more recent decisions.

§ 1. POWERS DISTINGUISHED.

§§ 1. AS TO THEIR SOURCE AND OPERATION.

- Power of appointing uses—power of revocation.
- Uses appointed take effect as if inserted in the original instrument—uses appointed upon a use—uses appointed in remainder—application of the rule in *Shelley's* case—of the rule against perpetuities.
- Uses vested in default of appointment.
- Powers created by will—at common law and under the Statute of Uses.
- Power to executors or trustees to sell—distinction between power and trust to sell—implied power in executors—statutory power in executors or trustees.
- Powers to lease, sell, charge, etc.—powers operating upon the beneficial interests—powers operating upon the subject of property.

Future uses may be completely declared as to the time of vesting, the event on which they are to arise, the persons to take and the estates to be taken, by the instrument raising the uses; or they may be reserved for future declaration, as to all or some

Powers of appointing uses.

of these particulars, by a person to whom authority is given by the instrument for that purpose, and who is then said to have a power of appointing the uses, or *power of appointment* (a).

Power of re-  
vocation.

The power necessarily operates to displace or *revoke* the uses previously vested, whether declared in the instrument or resulting by operation of law; it is therefore sometimes called a power of *revocation and new appointment*, and is sometimes expressly created in that form. The revocation, however, is implied in the appointment, to the extent to which the appointment of new uses is authorised (b).

Uses ap-  
pointed take  
effect as if  
inserted in the  
original in-  
strument.

The uses appointed take effect, from the time of appointment, in the same manner and subject to the same rules, as uses expressly declared and limited in the instrument creating the power; and they may, for most purposes, be read as if inserted therein in place of the power (c).

Uses ap-  
pointed upon  
a use, not  
executed by  
the statute.

Consequently, the uses appointed under a power will not be executed by the statute as legal estates, unless there be a seisin commensurate with such uses (d); nor if, when combined with the limitations in the deed, they appear to be uses limited upon a use; as where the conveyance is made to and to the use of A. to such uses as he or any other shall appoint; for in such case the uses appointed are beyond the operation of the statute, though they may be effectual as trusts in equity (e). So also if, under a power well created to appoint uses, the appointment be made to A. to the use of B., the statute executes the use in A., and the limitation to B. can only operate as a trust (f).

Uses ap-  
pointed as  
remainders.

Uses appointed, if they take effect as remainders after a particular estate in the use declared in the original instrument, are subject to the rules concerning remainders, and if contingent are liable to fail by the determination of the particular estate before they become vested (g).—But the power of appointing uses after a particular estate, before any appointment is made, is not equivalent to a remainder in this respect, and it may

(a) See *ante*, p. 88: "This sort of power is a mode, which the owner of the estate reserves to himself, or gives to another person, through the medium of the Statute of Uses, of raising and passing an estate." *Per* Eldon, L. C., 10 Ves. 266, *Maunderell v. Maunderell*.

(b) Butler's note to Co. Lit. 272 a, VII. 1; 1 Sanders, Uses, 160; Sugden, Powers, 200; Co. Lit. 237 a. A deed of appointment will be construed in law, first as a revocation and *cesser* of the ancient uses, and then a limitation or raising of the new: *Digge's Case*, 1

Co. 174 b. So a power of revocation reserved in a settlement to the settlor leaves him the power of appointing new uses: Sugden, Powers, 371. See *post*, p. 298.

(c) 2 Sugden, Powers, 470.

(d) Sugden, Powers, 149. See *ante*, p. 91.

(e) Sugden, Powers, 149. See *ante*, p. 93.

(f) Sugden, Powers, 190, 457.

(g) Sugden, Powers, 470. See *ante*, p. 237.

subsist and be well executed notwithstanding the particular estate has determined. Thus where land was settled to the use of A. for life, with remainder to the children of A. as A. and B. jointly, or as the survivor, should appoint, and A. died, it was held that the power of appointment in B. the survivor was well created, and that the uses afterwards appointed under it were valid and operated as springing uses (*h*).

Limitations of the use in the original instrument, and limitations appointed under a power contained in the same instrument, may unite under the rule in *Shelley's* case, although, as a general rule, limitations contained in different instruments cannot unite under that rule. Thus, if land be limited to the use of A. for life, and after his death to such uses as B. shall appoint, and B. during A.'s life appoints to the heirs or to the heirs of the body of A., the limitation under the appointment is construed as if inserted in place of the power in the instrument creating it, and according to the rule in *Shelley's* case gives A. the inheritance in fee or in tail. So conversely, with a limitation to the heirs or heirs of the body in the original instrument and a limitation for life subsequently appointed under a power created by the same instrument (*i*).

Rule in *Shelley's* case applied to appointed uses.

Also, the rule against perpetuities applies to the appointed uses, and the time for such uses to take effect is, in general, computed as if they had been inserted in the instrument creating the power (*k*).

Rule against perpetuities.

The uses of a conveyance may be expressly limited and declared in default of and until an appointment is made under a power given by the deed; and, if not expressly limited and declared, they will result to the grantor. The uses, whether expressly declared or resulting, are executed by the statute and become vested estates, but subject to be revoked and divested by the uses appointed under the power, which operate, when they arise, as shifting uses in substitution of the preceding estates (*l*).

Uses vested in default of appointment.

Powers may be created by will in the form of a common law authority operating directly upon the legal estate to appoint and

Powers created by will,—operating at common law or under the Statute of Uses.

(*h*) *Hole v. Escott*, 2 Keen, 444; 6 L. J. C. 355; 4 M. & Cr. 187; 8 L. J. C. 83. See *Wickham v. Wing*, 2 H. & M. 436; 34 L. J. C. 425; *Aylwin's Trusts*, L. R. 16 Eq. 585; 42 L. J. C. 745.

(*i*) *Fearne*, Cont. Rem. 74; *Sugden*, Powers, 471; *Venables v. Morris*, 7 T. R. 342, 438; see *Doe v. Welford*, 12 A. & E.

61. See *ante*, p. 247.

(*k*) As to the application of the rule to powers, see *post*, p. 332.

(*l*) *Fearne*, Cont. Rem. 226, 232; *Sugden*, Powers, 452, 622; *Doe v. Martin*, 4 T. R. 39; see *per* *Eldon*, L. C., *Maundrell v. Maundrell*, 10 Ves. 265.

limit it; or in the form of a power to appoint uses of the legal estate to be executed by the Statute of Uses. The nature of the power in this respect depends upon the intention of the testator as shown by the terms of limitation employed in creating the power; and the appointment under the power must be framed and construed according to the form of the power (*m*). A power given by will to appoint the legal estate may be exercised by appointing such estate, thereby raising a seisin at common law, with a declaration of uses upon which the statute will operate, and thus the legal estate may be disposed of under the power with all the freedom of limitation allowed to uses (*n*).

Powers to trustees or executors to sell.

Devise upon trust for sale.

Construction of wills as giving power or estate.

Implied power in executor.

A common example of powers in wills occurs where executors or trustees are directed or authorised to sell real estate for various purposes, as for the payment of debts, legacies, etc. (*o*). Where such a power is given, without any estate in the land, it operates by way of executory devise in favour of the person to whom the land is sold; and the purchaser takes as devisee under the will and not by way of conveyance from the trustee or executor. The fee descends to the heir until the power is executed. But where the land itself is devised to the trustee or executor for the purpose of the sale the purchaser takes by conveyance from them (*p*).—This distinction is practically important with copyholds, to which the Land Transfer Act, 1897, does not apply (*q*), for by giving a mere power of sale, instead of devising the land, a purchaser takes directly under the will, and the admittance of the trustees for sale, together with the fine payable thereupon, is avoided (*r*).

The distinction in the construction of wills appears to be this,—that a devise of the land to executors or others to sell passes the estate in the land to them for the purpose and upon trust for sale;—but a devise or direction that the executors shall sell the land, or that the land shall be sold by the executors, or even a devise of the land to be sold by the executors, gives them only a power and no estate (*s*).

Where a testator has directed his real estate to be sold without declaring by whom the sale shall be made, if the proceeds be distributable by the executor, he will have the power by impli-

(*m*) Sugden, Powers, 45, 146, 196—199; see Butler's note to Co. Lit. 272 *a*, VIII. 1. See *ante*, p. 95.

(*n*) Sugden, Powers, 197.

(*o*) See *ante*, pp. 193, 197.

(*p*) Co. Lit. 112 *b*; 236 *a*; *Warneford v. Thompson*, 3 Ves. 513.

(*q*) See *ante*, p. 66.

(*r*) *Ree v. Oundle*, 1 A. & E. 283;

*Glass v. Richardson*, 2 De G. M. & G. 658; 22 L. J. C. 105; *Reg. v. Wilson*, 3 B. & S. 201. See *Re Naylor and Spendlow's Cont.*, 34 Ch. D. 217; *Hall v. Bromley*, 35 Ch. D. 642.

(*s*) Sugden, Powers, 111—115, and authorities there cited and discussed; Williams, Executors, 490; *Doe v. Shotton*, 8 A. & E. 905.



cation; and it will pass by right of representation to the executor of his executor (*t*).

Where a testator has charged his real estate with the payment of debts and legacies, without making any express provision for raising the charge, a power to sell or mortgage for that purpose is given to the devisees in trust of the land, if there be such, and if not, to the executor, by the Law of Property Amendment Act, 1859, which applies to wills coming into operation after the 13th August, 1859. But the practical importance of this statute is displaced, except in the case of customary tenure, by the provisions of the Land Transfer Act, 1897, to which reference has been already made (*u*).

Power by statute to raise charge for debts and legacies.

Powers were formerly given in terms expressing the effect of the execution of the power, as to lease, sell, charge, etc., and such mode of creating the power sufficiently expresses the intention; but the correct form of the power, according to its technical mode of operation, is to authorise the revocation of the previous uses or estates, and the declaration of new uses or estates to the extent and for the purposes intended. So also powers were frequently executed in the form of a lease or conveyance or devise, although the technical operation of the instrument was strictly by way of declaration of the uses or estates to be taken under the instrument creating the power (*x*).

Powers to lease, sell, etc., operate by appointment of estates.

The powers usually given in settlements of land may be referred to two kinds according to the purpose effected. The one kind operate only upon the beneficial interests of the settlement and are designed to modify the uses and estates primarily settled and to introduce new ones to meet the future requirements of the settlement, without affecting the subject of property. Such are powers to jointure a wife, to raise portions for children,

Powers operating upon the beneficial interests.

(*t*) Sugden, Powers, 115—118. See *ante*, p. 198.

(*u*) See *ante*, pp. 197 *et seq.* If a joint power only is given to executors, all must join in selling at common law, and if one die the power can be no longer exercised. But by the statute 21 H. VIII. c. 4, if some refuse the administration, the rest may sell. A joint estate devised to trustees or executors upon trust to sell vests in the survivor, and the trust continues. As a general rule a power given to two or more persons by name is a *joint* power only and does not survive; but a power given to executors, trustees, or others as a class without naming them survives and the last survivor may

execute it. Co. Lit. 113 *a*, 181 *b*; Sugden, Powers, 125, 126, 128. Hence Coke's advice to them that make such devises by will, to direct "that the sale be made by his executors or the survivors or survivor of them, or by such as take upon them the probate of the will or the like."—"And it is better to give them an authority than an estate; unless his meaning be they should take the profits of his lands in the meantime; and then it is necessary that he deviseth that the mesne profits till the sale shall be assets in their hands, for otherwise they shall not be so." Co. Lit. 113 *a*.

(*x*) Sugden, Powers, 104, 837. See *Tarbut v. Marbury*, 2 Vern. 511.

Powers  
operating  
upon the  
subject of  
property.

and the like.—Other powers operate only upon the subject of property without affecting the beneficial interests. These operate either to convert the subject of property, wholly or in part, as occasion may require, as to convert land into money, or land into other land; such are powers of sale and exchange, powers of partition, powers to mortgage, and the like:—Or they are subservient to the management of the property in its existing state, so as to render it available and productive for the benefit of all the persons interested; such are powers of leasing, for agricultural or building purposes, powers of opening and leasing mines, and the like. These distinctions in the purposes effected will be found to have some practical consequences in the relative operation of the powers upon each other (*y*). In the case of settled land, statutory powers have been conferred upon limited owners to make leases, sales, exchanges, partitions, mortgages and the like. Some of these powers can only be executed with the consents mentioned in the various statutes, others may be exercised arbitrarily by the donee of the power (*z*). Mortgagees have now a statutory power of sale and of leasing, and mortgagors a statutory power of leasing (*a*).

(*y*) See 1 Sanders, Uses, 170; Sugden, Powers, 488. As to what are usual powers to be inserted in settlements made under articles of agreement or executory trusts or under the direction of the Court, see Sugden, Powers, 150; *Glenorchy (Lord) v. Bosville*, Cas. t. Talb. 3; 2 Wh. & T. L. C. Eq. 763, and notes.

(*z*) Settled Estates Act, 1877, which

replaces, with amendments, earlier statutes having the like object; extended in its operation by s. 41 of the Conveyancing and Law of Property Act, 1881, Settled Land Acts, 1882, 1884, 1887, 1889, 1890.

(*a*) Conveyancing and Law of Property Act, 1881, ss. 18, 19, 20, 21. See *Robbins v. Whyte*, [1906] 1 K. B. 125; 75 L. J. K. B. 38.

§§ 2. POWERS DISTINGUISHED IN CONNECTION WITH ESTATES.

Power co-existing with estate—conveyance of estate—execution of power—donee of power subsequently acquiring the fee.

Execution of power divests estate limited in default of appointment.

Power cannot be exercised in derogation of conveyance—conveyance with reservation of power—powers impliedly reserved—effect of a judgment upon the power.

Powers appendant.

Powers *collateral* or in gross—power simply collateral.

Powers both appendant and collateral.

A power may co-exist with an estate or interest in the land in the same person.—Thus if land be limited to such uses as A. shall appoint, and in default of and until appointment to the use of A. and his heirs, the use is executed in A. for an estate in fee simple, but subject to be divested by an exercise of the power (*a*).—If the conveyance be made in the form to A. and his heirs, to the use of A. and his heirs, with a power in A. to appoint new uses, A. takes at common law for his own use and not under the statute, nor can any further use be limited upon the use in A. within the operation of the statute; but the power will operate by the appointment of new uses in displacement and substitution of the use in A., and the new uses in favour of other persons will be executed by the statute (*b*).

Power co-existing with estate.

Land settled as A. shall appoint, and in default of appointment to A. and his heirs.

To and to the use of A. and his heirs with power in A. to appoint new uses.

In such cases A. may convey or devise his estate in exercise of the power of disposition incident to the estate, and the purchaser will then take under his deed of conveyance or by his will;—or he may execute his power of appointment, and the purchaser or appointee will then derive title through the appointment from the original instrument creating the power (*c*).

Conveyance of estate.

Execution of power.

Deeds are often framed, for the sake of security, in a manner purporting to operate both ways, by conveyance and by appointment, leaving the question whether they operate in the one way or the other to be determined, if necessary, when the occasion arises. They will be construed as operating in that way which most effectually carries out the intention of the transaction (*d*).

The fee and the power thus co-exist in the same person when originally so limited; but if the donee of the power subsequently

Donee of power subsequently acquiring fee.

(*a*) *Maundrell v. Maundrell*, 10 Ves. 246; Sugden, Powers, 479.

(*b*) See *ante*, p. 93.

(*c*) Sugden, Powers, 93, 479; *Clere's Case*, 6 Co. 17 *b*; *Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. 246.

(*d*) Sugden, Powers, 357; *Cox v. Chamberlain*, 4 Ves. 631; *Rouch v. Wadham*, 6 East, 289. As to the correct mode of framing deeds of appointment and conveyance, see Sugden, Powers, 193.

acquire the fee simple, the power would, in general, cease according to the intention, as being no longer required for any purposes of its creation.—This might occur under settlements of land limited to a tenant for life, with powers of sale, leasing, charging, etc., and with the ultimate remainder to him in fee; if the fee became executed in the tenant for life by the failure of the intermediate limitations between the life estate and the ultimate remainder, the powers ceased to be exercisable, not on the ground that they had merged, but that according to the true construction of the settlement they were not intended to endure beyond the continuance of the limitations which they were intended to overreach (e).

Execution of power divests the estate and all original charges.

An appointment of uses under the power operates upon the estate limited in default of or subject to the appointment by divesting and superseding it, with all the charges and incidents affecting it at the time of its creation; as the claim of a wife to dower (f),—or a covenant to pay a rent charged upon the estate, which would run with the land as against a grantee of the estate (g).

Power cannot be exercised in derogation of conveyance.

On the other hand, a conveyance or disposition of the estate, made in exercise of the right of ownership, whereby it is charged or alienated, does not extinguish the power which may still be exercised, but the interests of the alienee or grantee are protected by requiring his consent to an execution of the power which could operate to his prejudice.—Accordingly, if land be limited to A. for life with remainders over, with remainder to A. in fee, and with a power in A. to revoke and appoint new uses in favour of particular objects; though a conveyance by A. of all his estate and interest would suspend the operation of the power against the grantee without his consent, as to the life estate and remainder in fee, yet as to the intermediate remainders, which are not affected by the conveyance, the power may still be executed. Thus upon the bankruptcy of A., which would transfer all his estate to the trustee in bankruptcy, the power would

(e) Sugden, Powers, 98, 859; *Cross v. Hudson*, 3 Bro. C. C. 30; *Wolley v. Jenkins*, 23 Beav. 53; 26 L. J. C. 379; affd. 3 Jur. N. S. 321; *Brown's Settlement*, L. R. 10 Eq. 349; 39 L. J. C. 845; *Re Jump*, [1903] 1 Ch. 129; 72 L. J. C. 16; *Re Cotton's Trustees and School Bd. for London*, 19 Ch. D. 624; 51 L. J. C. 514.

(f) Sugden, Powers, 479; *Ray v. Pung*, 5 B. & Ald. 561; 5 Madd. 310.

See *Sweetapple v. Horlock*, 11 Ch. D. 745; 48 L. J. C. 660; *Jackson v. Commissioner of Stamps*, [1903] A. C. 350; 72 L. J. P. C. 68.

(g) *Rouch v. Wadham*, 6 East, 289. But the benefit of covenants made with the donee of the power and his appointees may run with the land in favour of the appointee. *Spoor v. Green*, L. R. 9 Ex. 105; 43 L. J. Ex. 57.

be so far suspended; but as to the estates limited to others, and not affected by the bankruptcy, the power would still be operative (*h*).

A conveyance of the estate may be made with an express reservation of the power.—Where the tenant for life under a settlement containing powers of sale and conversion exercisable with his consent, conveyed his interest to a purchaser by the description of all his interest in the lands and funds into which the settled property then was or *at any time thereafter might be converted* and changed, it was held that the purchaser took the property subject to the powers of conversion, and that the subsequent consent of the tenant for life to a conversion was no derogation from his grant (*i*).

Conveyance with reservation of power.

Where an estate subsists together with a power of leasing at a rent not less than the full value, a conveyance merely by way of mortgage or security for a charge, impliedly reserves the power to its full extent, because the power is not derogatory to the security, but auxiliary to it (*k*). So a power to appoint new trustees may be exercised by a tenant for life who has parted with his life interest, without the consent of the alienee (*l*). Where the tenant for life under a settlement, having a power to renew leases and take the fines on renewal for his own benefit, assigned all his interest under the settlement by way of mortgage; it was held that the power might be exercised notwithstanding the mortgage, but that the consent of the mortgagee was necessary, for he being assignee of the fines had an interest in every renewal which might be granted (*m*).

Implied reservation of power.

A tenant for life cannot make a valid contract not to exercise the powers conferred upon him by the Settled Land Acts, but if he has for value aliened or incumbered his life interest, his statutory powers cannot be exercised to the prejudice of the alienee without his consent (*n*).

Statutory powers.

A judgment, as formerly charging the land, was considered to do so not by act of the party, but *in invitum*, and therefore did not affect the power, and was liable to be defeated by an execution

Effect of a judgment against the donee of a power.

(*h*) *Long v. Rankin*, Sugden, Powers, App. 2, p. 895; *Bringloe v. Goodson*, 4 Bing. N. C. 726; *Jones v. Winwood*, 3 M. & W. 653; 10 Sim. 150; 10 L. J. C. 165; *Alexander v. Mills*, L. R. 6 Ch. 124; 40 L. J. C. 73; *Hardaker v. Moorhouse*, 26 Ch. D. 417; 53 L. J. C. 713; *Re Bedingfeld and Herring's Cont.*, [1893] 2 Ch. 332; 62 L. J. C. 430. See *Noel v. Henley*, McCl. & Y. 302.

(*i*) *Warburton v. Farn*, 16 Sim. 625.

(*k*) *Long v. Rankin*, Sugden, Powers, App. 2, p. 895.

(*l*) *Hardaker v. Moorhouse*, 26 Ch. D. 417; 53 L. J. C. 713.

(*m*) *Simpson v. Bathurst*, L. R. 5 Ch. 193.

(*n*) Settled Land Act, 1882, s. 50; *Re Barlow's Cont.*, [1903] 1 Ch. 382; 72 L. J. C. 214; *Re Dickinson and Kelsall's Cont.*, [1908] 1 Ch. 213; 77 L. J. C. 177.

of the power (*o*). The Judgments Act, 1838, s. 13, made the judgment an actual charge on the property over which the debtor has any disposing power for his own benefit, as if he had actually charged it.—But by sect. 2 of the Lands Charges Act, 1900, a judgment does not operate as a charge upon land until a writ or order for enforcing it is registered under sect. 5 of the Lands Charges Act, 1888.—By sect. 11 of the Judgments Act, 1838, lands over which the judgment debtor has any disposing power which he might, without the assent of any other person, exercise for his own benefit, may be taken in execution (*p*).

Powers have been distinguished and designated according to their operation upon the estate of the donee, and their consequent dependence for their full efficacy upon the continuance of that estate, as follows:—

Powers appendant to estate.

“Powers *appendant* or *appurtenant* are so termed because they strictly depend upon the estate limited to the person to whom they are given.” They are restricted by any alienation or disposition of that estate inconsistent with a subsequent exercise of the power; for the power cannot be afterwards exercised in derogation of such alienation. As where an estate is limited to the use of a person in fee, with a power of revocation and new appointment;—or where an estate for life is limited to a person with a power to grant leases in possession;—in either case an alienation of the estate restricts the power to the extent of the alienation, and the power is so far appendant or appurtenant to the estate (*q*).—Powers appendant may also be extinguished by release (*r*).

Powers collateral or in gross.

Powers which do not operate upon an estate limited to the person to whom they are given, are called collateral or in gross. They include powers given to a person to whom an estate is limited, but which enable him to create such estates only as do not operate upon his own estate; also powers given to a person having no estate.—Instances of the former kind occur in the case of a tenant for life, with a power of appointing a jointure to his widow, which cannot operate until after the determination of his life estate; and in the case of a tenant for life with a power of appointing after his death to his children.—Such powers in

In person having estate.

(*o*) Sugden, Powers, 480.  
 (*p*) See as to these statutes Carson, Real Prop. Stats. pp. 483 *et seq.*  
 (*q*) Sugden, Powers, 46, 51, 57. See cases cited *ante*, p. 277, n. (*h*).

(*r*) Sugden, Powers, 82. See now Conveyancing and Law of Property Act, 1881, s. 52; Conveyancing Act, 1882, s. 6; Settled Land Act, 1882, s. 50.

a tenant for life are not, like powers appendant, affected by a conveyance of his life estate; because they do not operate in derogation of the conveyance. But they may be released and extinguished by him (s).

Powers in gross in a person having no estate in the land are distinguished into those which the donee of the power may exercise for his own benefit,—and those which he can exercise for the benefit of others only, without any benefit to himself. The former partake of the nature of property or interest, and may therefore be released or extinguished by the donee of the power.—An instance of this kind of power occurs where a person seised in fee settles his whole estate upon others, but reserves to himself a power of revocation. Such power is a power in gross and part of his old dominion; by revocation of the uses he would be restored to his former ownership; and it is therefore capable of being released and extinguished (t).—So if the power of revocation be reserved to the heir of the settlor, because by the revocation the heir would be restored to the estate (u).

In person having no estate.

Power reserved upon settlement of estate.

A power in a person having no estate or interest in the land which he can exercise for the benefit of others only, and not of himself, is called a power *simply collateral*. As for example, a power given to a stranger to revoke a settlement and appoint new uses to other persons designated in the deed. Also powers given to executors to sell land for the purpose of the will, and powers given to trustees of settlements to sell, lease, etc. are examples of powers *simply collateral* (x).—Powers of this kind give a bare authority without any property or interest, and could not be released or extinguished by the donee of the power, but only by those persons for whose benefit they are created (y). If coupled with a trust or duty these powers cannot be released under sect. 52 of the Conveyancing and Law of Property Act, 1881 (z); or, it would seem, disclaimed under sect. 6 of the Conveyancing Act, 1882.

Power simply collateral.

It may be observed that “a power in gross, and a power collateral (not *simply collateral*) is one and the same thing;” though the word collateral has been sometimes used as meaning *simply collateral* in distinction to powers in gross (a).—“This

(s) Sugden, Powers, 46, 79, 82. See now Conveyancing and Law of Property Act, 1881, s. 52; Conveyancing Act, 1882, s. 6; Settled Land Act, 1882, s. 50.

(t) Sugden, Powers, 47, 82; Co. Lit. 237 a, 265 b; *Albany's Case*, 1 Co. 110 b. See Conveyancing and Law of Property Act, 1881, s. 52; Conveyancing Act,

1882, s. 6.

(u) *Grange v. Tiring*, Bridgm. 114.

(x) Sugden, Powers, 47.

(y) Sugden, Powers, 47, 49; Co. Lit. 237 a, 265 b; *Digge's Case*, Moor, 605.

(z) *Re Eyre*, 49 L. T. 259; *Scul v. Pattinson*, 55 L. J. C. 831.

(a) Sugden, Powers, 906.

classification of powers is important only with reference to the ability of the donee to suspend, extinguish, or merge the power" (b)

Power appendant as to some estates and collateral as to others.

The same power may have different aspects and may be both appendant and collateral with reference to different estates of the donee upon which it operates; as, if a settlement be made to A. for life with remainder to B. for life or in tail, with remainder to A. in fee, and A. be given a power to jointure his wife or to appoint to his children after his death, the power is collateral or in gross as to his life estate, but appendant or appurtenant as to his remainder in fee. And if he conveyed the fee, he would remove it from the operation of the power; but the power would remain operative over the intermediate remainder after the death of A. (c).

### §§ 3. POWERS DISTINGUISHED, AS TO THE OBJECTS OF THE POWER.

General and particular powers.

Powers of appointment to a class—Distributive and exclusive powers—power of selection from class.

Power to appoint to children—to children living at death of parent—child *en ventre sa mère*—power to appoint to "relations."

Implied gift to children in default of appointment—gift to children with power to apportion shares.

Powers distinguished as to the object, —general and particular powers.

Powers are also distinguished, in regard to the objects of the power, into *general* and *particular* or *special* powers.—A general power authorises an appointment to any person;—a particular or special power restricts the appointment to some person or persons, or class of persons specified in the creation of the power (a).—"A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases; he has an absolute disposing power over the estate." This distinction of general and particular powers has some important consequences in the execution of powers (b).

Power of appointment to class of objects.

A power of appointment to a class of objects, as children, may

(b) Sugden, Powers, 49.

(c) Sugden, Powers, 47, 87; see *ante*, p. 278.

(a) Sugden, Powers, 394.

(b) Sugden, Powers, 181, 195, 394. See *post*, pp. 294, 300.



be *distributive* amongst all the individuals of the class, also called a *non-exclusive* power; or *exclusive*, authorising a selection of one or more to the exclusion of the rest, according to the terms of the power.—A power given in the terms, “to all and every the children,” or “to and amongst” or “amongst” the children, or “in such shares” as A. shall appoint, is distributive only and not exclusive, and originally every one of the objects of the power was entitled to have a substantial share of the property appointed to him (*c*).—A power in the terms, “to such,” or “to and amongst such” or “to one or more” of the children, as A. shall appoint, imports the power of appointing to some exclusively; the power is distributive and exclusive (*d*).—A power in the terms, “to one” of the children, as A. shall appoint, gives the power of selecting one; it is exclusive only and not distributive (*e*).

Distributive and exclusive power.

Power of selection.

A power to appoint to children does not extend to grandchildren; although the power be expressed to be to the children “for such estate and subject to such provisions and limitations as the donee of the power may direct, limit, or appoint.” And under such a power an appointment to a child for life with remainder to his children in strict settlement would not be authorised except as to the appointment to the child, and beyond that would be void (*f*). But if the child be a party to a deed of appointment in this form, it may be supported as operating first as a good appointment to the child, and then as a settlement by him (*g*). An appointment by will to a child followed by limitations to grandchildren and other descendants, where children alone were objects of the power, may be supported as giving estates tail to the children upon the doctrine of *cy-pres* (*h*). This construction is inadmissible in the case of a deed (*i*).

Power to appoint to children, etc.

The power of appointment to children may be restricted in its terms to the children living at the death of the parent or some other time, although it be exercisable by deed or will, and in such case those children only who survive are objects of the power (*k*).

To children living at death of parent.

A child *en ventre sa mère*, who is afterwards born, is considered

(*c*) Sugden, Powers, 444; *Gainsford v. Dunn*, L. R. 17 Eq. 405; 43 L. J. C. 403; *Re Veale's Trusts*, 5 Ch. D. 622; 46 L. J. C. 799; *Re Deakin*, [1894] 3 Ch. 565; 63 L. J. C. 779. As to illusory appointments, or a power to exclude objects under a non-exclusive power, see *post*, p. 315.

(*d*) Sugden, Powers, 444.

(*e*) *Brown v. Higgs*, 4 Ves. 708, 717; *Re Porter's Settlement*, 45 Ch. D. 179;

59 L. J. C. 595.

(*f*) Sugden, Powers, 664; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382. See *Fowler v. Cohn*, 21 Beav. 360.

(*g*) Sugden, Powers, 670; *Thompson v. Simpson*, 1 Dr. & War. 459.

(*h*) Sugden, Powers, 499; *Line v. Hall*, 43 L. J. C. 107. See *Re Rising*, [1904] 1 Ch. 533; 73 L. J. C. 455.

(*i*) *Brudenell v. Elwes*, 1 East, 451.

(*k*) Sugden, Powers, 674.

Child *en*  
*contre sa mère*  
capable of  
taking.

as existing for the purpose of taking by appointment under a power to appoint amongst children living at the death of the father (*l*).

Power to  
appoint to  
relations.

A power to appoint amongst "relations," where the donee has a mere power of selection or of distribution, is restricted to those persons who are next of kin according to the Statute of Distribution, subject to the ascertainment of the class at the period indicated by the settlor; but if the donee is empowered to select one or more members of the class to the exclusion of others of the same class, then the word "relations" will be taken to include the larger class usually denoted in popular language by that expression (*m*).

Implied gift  
to children in  
default of ap-  
pointment.

Where a power of appointment amongst children is given by will, whether exclusive or non-exclusive, without any express gift to the children in default of appointment, a gift to the children in that event may be implied from the terms of a gift over (*n*). But under such implied gift those children only can take in default of appointment who were capable of taking by appointment. So that if the power be restricted to children living at the death of the parent, (as where it is exercisable by will only,) the surviving children only take in default of appointment, and those dying in the lifetime of the parent are excluded (*o*).—A power to appoint to one only of children to be selected exclusively of the others would not raise such implication in favour of all the children or of any of them (*p*).

Gift to chil-  
dren with  
power to ap-  
portion  
shares.

But where there is a gift to children with a power of appropriating the shares in which they are to take,—as, to all the children of A. in such shares as A. should appoint by will,—the children take vested interests by the express terms of the gift, subject to be divested by the exercise of the power, and a child dying in the lifetime of the parent will remain entitled in default of appointment, notwithstanding the power, being by will only, is restricted to those living at the death of the parent (*q*).

(*l*) *Beale v. Beale*, 1 P. Wms. 244. See *Villar v. Gilbey*, [1907] A. C. 129; 76 L. J. C. 339.

(*m*) Sugden, Powers, 653, 657; *Re Deakin*, [1894] 3 Ch. 565; 63 L. J. C. 779.

(*n*) Sugden, Powers, 591; *Brown v. Higgs*, 8 Ves. 574; *Butler v. Gray*, L. R. 5 Ch. 26; 39 L. J. C. 291; *Wilson v. Duguid*, 24 Ch. D. 244; *Richardson v. Harrison*, 16 Q. B. D. 85; *Re Weekes'*

*Settlement*, [1897] 1 Ch. 289; 66 L. J. C. 179.

(*o*) Sugden, Powers, 595. See *Phene's Trusts*, L. R. 5 Eq. 346; *Wilson v. Duguid*, 24 Ch. D. 244; 53 L. J. C. 52.

(*p*) Sugden, Powers, 593.

(*q*) Sugden, Powers, 597; *Lambert v. Thwaites*, L. R. 2 Eq. 151; 35 L. J. C. 406; *Re Jackson's Will*, 13 Ch. D. 189; 49 L. J. C. 82; *Wilson v. Duguid*, 24 Ch. D. 244; 53 L. J. C. 52.

Where by a settlement a sum of money was charged for the younger children to be paid in such shares as the father should appoint and in default of appointment equally, and the father appointed a certain sum to one of the children, it was held the unappointed portion must be equally divided amongst all the children including that one to whom the appointment had been made (*r*).

## § 2. CONSTRUCTION OF POWERS.

Construction of Powers as to the Uses and Estates to be appointed.

Power in general terms extends to fee—power to appoint fee includes less estates—appointment of a charge—of a sale and conversion.

Devise of absolute power of disposition passes the fee—disposition restricted as to the objects—devise for life with power over remainder.

Construction of powers as to priority of operation.

The power does not, in general, limit the uses and estates to be appointed, but only gives authority to appoint them. Therefore technical words of limitation are not required, even in a deed; and the extent of the authority, as regards the uses and estates to be appointed depends upon the intention of the power, collected from the terms and purpose of its creation (*a*).

Construction of powers as to uses and estates to be appointed.

A power to sell or appoint or dispose of land in general terms, without any express or implied restriction of the estates to be created, extends to the fee; it imports the same power of disposition as the donor of the power himself had (*b*).—So a power to appoint or dispose of land to a particular object or objects, without words of limitation, authorises an appointment in fee (*c*).

Power in general terms extends to the fee without words of limitation.

A power to appoint the fee simple or to appoint in general terms, without restriction as to the nature or quality of the estate or interest to be appointed, also authorises an appointment of any less estate or interest derivable out of the fee (*d*).

Power to appoint fee includes lesser estate.

A power extending to the fee may be well executed by appointing a charge upon the land in favour of an object of the power, giving an equitable interest only, whether with or

Appointment of charge.

(*r*) *Walmsley v. Vaughan*, 1 De G. & J. 114; 26 L. J. C. 503; and see *Simpson's Settlement*, 4 De G. & Sm. 521; 20 L. J. C. 415, where "in default of appointment" was construed to mean so far as an appointment should not extend.

(*a*) Sugden, Powers, 102, 398.

(*b*) Sugden, Powers, 398; *Wood v. Richardson*, 4 Beav. 174.

(*c*) Sugden, Powers, 400; *Liefe v. Saltingstone*, 1 Mod. 189; 1 Freem. 176.

(*d*) Sugden, 408, 412, 837; *Crozier v. Crozier*, 3 Dru. & War. 353.

Of sale and  
conversion.

without a legal term or interest as auxiliary to it (*e*);—or by appointing that the land shall be sold and the proceeds distributed amongst the objects of the power (*f*).—So a power of appointment over real estate, unrestricted as to the estates or interests to be appointed, may be well executed by appointing a share to an object of the power and declaring that it shall be of the nature of personal estate; and the interest in such share will be transmissible accordingly (*g*). And where lands are devised in trust for sale, with a direction to invest the proceeds of sale in other lands, a power to appoint the lands so to be purchased is well executed by an appointment operating directly upon the original estates (*h*).—In such cases, though the appointment may not be formally void at law, as where it is made to trustees for sale, (such trustees not being objects of the power,) it is valid in equity and will be carried into effect (*i*).

Devise of  
absolute  
power of dis-  
position  
passes the fee.

A devise to a person in terms importing that he may dispose of the property at his absolute discretion confers an estate in fee simple or the entire interest, and not merely a power; but this construction does not apply to a conveyance by deed, in which such form of limitation would merely confer a power of appointment (*k*).

Disposition  
restricted as  
to the objects.

Where the devise is accompanied with expressions restricting the disposition to particular objects, the question often arises whether such expressions are obligatory and create a trust in favour of the objects mentioned. No general rule can be laid down, but the tendency of modern decisions is not to cut down a gift which is absolute in terms to a life estate with a power of appointment, unless the language clearly indicates that that was intended. The question in each case is one on the construction of the particular instrument (*l*).

Devise for life  
with power  
over remain-  
der.

A devise to a person for life expressly, with remainder to such persons as he shall by deed or will or otherwise appoint, does

(*e*) Sugden, Powers, 405; *Roberts v. Driall*, 2 Eq. Ca. Abr. 668; Sugden, Powers, 930.

(*f*) *Long v. Long*, 5 Ves. 445, where the power in terms extended to charging only, but to an unlimited extent; *Kenworthy v. Bute*, 6 Ves. 793; *Re Redgate*, [1903] 1 Ch. 356; 72 L. J. C. 204.

(*g*) *Webb v. Sadler*, L. R. 8 Ch. 419; 42 L. J. C. 498.

(*h*) *Bullock v. Fladgate*, 1 Ves. & B. 471.

(*i*) Sugden, Powers, 406; *Re Adams'*

*Trustees and Frost's Cont.*, [1907] 1 Ch. 356; 76 L. J. C. 408.

(*k*) Sugden, Powers, 104, 134; *Re Maxwell's Will*, 24 Beav. 246; 26 L. J. C. 854; *Synges v. Synges*, [1896] 1 Ch. 272. See *ante*, p. 119. As to a devise to executors or trustees passing the fee or a power to sell only, see *ante*, p. 272; Sugden, Powers, 111.

(*l*) *Lambe v. Eames*, L. R. 6 Ch. 597; 40 L. J. C. 447; *Re Williams*, [1897] 2 Ch. 12; 66 L. J. C. 485. See *ante*, p. 101.

not give him the absolute interest; although he may acquire it by an exercise of the power (*m*).—So, a devise to a person for life, with remainder to his “assigns” gives him a life estate with a general power of appointment over the remainder (*n*).

Where several powers are given or reserved by the same deed or instrument, which cannot operate concurrently, the question occurs as to the priority of their operation. This may be expressly provided for in the terms of the instrument; but the usual practice seems to be to leave it to be determined by construction of law from the purpose and intention of the powers and the occasions for their exercise (*o*).

Construction of powers as to priority of operation.

A power of sale and exchange necessarily operates by its exercise a complete conversion of the subject of property and, in general, supersedes all the then existing uses, estates, and powers under the settlement, (except a lease previously created under a power of leasing,) and transfers them, so far as they apply, to the property purchased or taken in exchange (*p*). Similarly, a power of partition shifts all the uses from the undivided moiety to the specific separate moiety acquired by the partition (*q*).—So, a power to raise money for payment of debts or legacies, in general, takes priority of all beneficial estates and interests in the property (*r*).

Powers of sale, exchange, partition, and charging.

A power of leasing, the purpose of which is the profitable disposal of the property for the time being in the interest of all persons beneficially entitled under the settlement, necessarily operates in priority to all other powers then subsisting. The execution of a lease under the power effectually displaces the possession during the term thereby created and vests it in the lessee, as against all the estates in the settlement, which it renders reversionary in regard to the lease; and all other powers subsequently executed operate only upon the reversion (*s*).—The benefit of the rents, covenants, conditions and rights of entry under the lease, provided it be made in accordance with the power, becomes incident to the reversionary estates and interests under the settlement in their order of succession (*t*).

Power of leasing.

(*m*) Sugden, Powers, 105. See *Pennock v. Pennock*, L. R. 13 Eq. 144; 41 L. J. C. 141; *Re Thomson's Estate*, 14 Ch. D. 263; 49 L. J. C. 622.

(*n*) *Questead v. Michell*, 24 L. J. C. 722. See *Brookman v. Smith*, L. R. 6 Ex. 291; L. R. 7 Ex. 271; 40 L. J. Ex. 161; 41 L. J. Ex. 114.

(*o*) Sugden, Powers, 488; 1 Sanders, Uses, 170; Butler's note to Co. Lit. 271 b, 111. 4.

(*p*) Sugden, Powers, 482.

(*q*) Sugden, Powers, 483; *Uchridge (Evel) v. Bayley*, 1 Ves. jun. 499; 4 Bro. C. C. 13.

(*r*) *Bringloe v. Goodson*, 4 Bing. N. C. 726; 8 L. J. C. P. 116.

(*s*) Sugden, Powers, 483; *Rogers v. Humphreys*, 4 A. & E. 299; 5 L. J. K. B. 65; *Bringloe v. Goodson*, 4 Bing. N. C. 726; 8 L. J. C. P. 116.

(*t*) *Whitlock's Case*, 8 Co. 69 b; *Isher-*

Statutory  
powers of  
sale, etc.

The statutory powers to sell, exchange, partition, lease, mortgage, or charge conferred upon limited owners by the Settled Land Acts, 1882 to 1890, if exercised, transfer the land conveyed "discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (i) all estates, interests, and charges having priority to the settlement; and (ii) all such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii) all leases and grants at fee farm rents or otherwise," and certain other matters "granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life" (*u*). Mortgagors and mortgagees of land while they are in possession may make leases of the mortgaged land. The lease takes effect out of the interest of the mortgagor (*x*).

Power of  
jointuring.

A power of jointuring, according to its purpose, operates from the death of the husband, and takes priority of all other beneficial uses and estates of the settlement then subsisting or arising upon that event (*y*).

Power of  
charging por-  
tions.

A power of charging portions for children, in general, takes effect after the life estate of the father, and subject to the jointure of his widow (*z*).

*wood v. Oldknow*, 3 M. & S. 382; *Rogers v. Humphreys*, 4 A. & E. 299; Butler's note to Co. Lit. 214 *a*. Where the lessor having a power of leasing under a settlement made a lease reserving the rent to himself, his heirs and assigns, without any reference to the power whereby the reservation might be explained and directed, it was held that the lease operated only by way of estoppel between the parties to it, and was void both for and against the persons entitled under the settlement. *Yellowly v. Gower*, 11 Ex. 274; 24 L. J. Ex. 289, explaining *Greenaway v. Hart*, 14 C. B. 340; 23 L. J. C. P. 115, in which case a lease made in like terms but with express reference to the power was supported in

accordance with the apparent intention.

(*u*) Settled Land Act, 1882, s. 20. See Carson's Real Prop. Stats. 673 and the cases there cited, and *Re Dickinson and Kelsall's Cont.*, [1908] 1 Ch. 213; 77 L. J. C. 177.

(*x*) Conveyancing and Law of Property Act, 1881, s. 18; *Robbins v. Whyte*, [1906] 1 K. B. 125; 75 L. J. K. B. 38.

(*y*) Sugden, Powers, 484; *Re De Houghton*, [1896] 2 Ch. 385; 65 L. J. C. 667. See *Re Hancock*, [1896] 2 Ch. 173; 65 L. J. C. 690; *Re Aylesbury (Marq.) and Iveagh (Ltd.)*, [1893] 2 Ch. 345; 62 L. J. C. 713; *Re Keck and Hart's Cont.*, [1898] 1 Ch. 617; 67 L. J. C. 331.

(*z*) Sugden, Powers, 487.

§ 3. EXECUTION OF POWERS. §§ 1. TIME OF EXECUTION.

Power may be executed at any time during the life of the donee—notwithstanding the determination of his estate.

Power to be exercised at a future time or event—after decease—when in possession of estate.

Power given upon contingency—power given to survivor of two or more persons.

Power restricted to certain time or event—during coverture—powers in settlements.

A power given to a tenant for life in general terms, without express or implied restriction of the time of execution, may be exercised at any time during the life of the donee (*a*). And where the donee of the power takes an estate determinable during his life, the power may continue and be exercised, though the estate be determined and the remainder vested in possession until appointment. Thus where real estate was settled upon A. for life or until bankruptcy, with remainder to his children as he should appoint, and in default of appointment to the children equally; upon his bankruptcy the property vested in possession in the children, but was subject to a subsequent execution of the power (*b*).—Where the donee of the power took a determinable estate, and it was expressly provided that upon the determination of his estate in the event specified the property should go over as if he were actually dead, it was held that his power ceased upon the determination of his estate (*c*). The statutory powers of a tenant for life under the Settled Land Acts, 1882 to 1890, “are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of the tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement” (*d*).

Power given to tenant for life.

Notwithstanding determination of his estate and vesting of remainder.

A power to be exercised at a future time or in a future event cannot be executed until the time arrives or the event happens. Thus, a power of sale given *after the decease* of a person cannot, in general, be exercised during his life (*e*).—So, where in a settle-

Power to be exercised at future time.

After decease of a person.

(*a*) Sugden, Powers, 260. See *Blackwood v. Burrowes*, 4 Dr. & War. 441.

(*b*) *Aylwin's Trusts*, L. R. 16 Eq. 585; 42 L. J. C. 745; *Wickham v. Wing*, 2 H. & M. 436; 34 L. J. C. 425.

(*c*) *Potts v. Britton*, L. R. 11 Eq. 433.

(*d*) Settled Land Act, 1882, s. 50; *Re Barlow's Cont.*, [1903] 1 Ch. 382;

72 L. J. C. 214; *Re Wimborne (Lord) and Browne's Cont.*, [1904] 1 Ch. 537; 73 L. J. C. 270.

(*e*) Sugden, Powers, 266; Co. Lit. 112 *b*; *Johnstone v. Baber*, 8 Beav. 233. See cases cited *Want v. Stallibrass*, L. R. 8 Ex. 175; 42 L. J. Ex. 108.

ment a power of leasing was given to the father (tenant for life) during his life, and after his decease to the son (tenant for life in remainder) during his life; it was held that the son could not lease under the power during the lifetime of the father, although the father conveyed his estate to the son (*f*).

Power given to tenant for life to appoint uses arising after his decease.

But a power given to appoint uses or estates after the decease of a tenant for life may require to be construed relatively to the prior life estate, as applying to the time of possession of the estate to be appointed and not as limiting the time for executing the power (*g*).—A limitation to A. for life and “at” or “after” his death as he shall appoint, does not restrict the execution of the power to a will, but it may be made at any time during his life. On the other hand, where the terms of a power are only consistent with a testamentary power of appointment, the power will be so restricted (*h*).

Power given when in possession.

A power given to the tenant of an estate to be executed when in actual possession of the estate cannot be executed before he obtains possession; and, in general, possession of his own estate is intended, so that the power cannot be accelerated by possession acquired under a grant of a prior possessory estate (*i*). The person to exercise, as tenant for life, the statutory powers conferred by the Settled Land Acts, 1882 to 1890, must be “beneficially entitled to possession of settled land,” which has been interpreted to mean in possession as contradistinguished to in reversion (*k*). Where two or more persons are so entitled they together constitute a tenant for life (*l*).

There was a jurisdiction in equity (now possessed by all branches of the Supreme Court) to enforce a covenant or contract to execute the power when it arises, if made at a date anterior to that at which the power was actually exercisable (*m*).

Power given upon a contingency.

Whether a power given upon a contingency can be exercised before the contingency happens, depends upon the nature of the contingency. Thus a power given to a person in case of failure of issue at his death may be executed during his life, though

(*f*) *Cree v. Day*, 13 East, 118.

(*g*) Hargrave's note (2) to Co. Lit. 113 *a*; *Alexander v. Young*, 6 Hare, 393.

(*h*) Sugden, Powers, 210; *Re Jackson's Will*, 13 Ch. D. 189; 49 L. J. C. 82; and the cases there cited; *Re Flower*, 55 L. J. C. 200.

(*i*) Sugden, Powers, 269; *Cree v. Day*, 13 East, 118.

(*k*) Settled Land Act, 1882, s. 2; *Re Atkinson*, 31 Ch. D. 577; 55 L. J. C. 49; *Re Llanover's (Baroness) Will*, [1903] 1 Ch. 16; 72 L. J. C. 406. See

Carson, Real Prop. Stats. p. 658. See as to persons having powers of a tenant for life Settled Land Act, 1882, ss. 58—63; Carson's Real Prop. Stats. pp. 699 *et seq.*

(*l*) Settled Land Act, 1882, s. 2; *Re Atkinson*, 31 Ch. D. 577; 55 L. J. C. 49; *Re Collinge's Sett.*, 36 Ch. D. 516; 57 L. J. C. 219; *Re Osborne & Bright's, Ltd.*, [1902] 1 Ch. 335; 71 L. J. C. 215.

(*m*) Sugden, Powers, 550; and see *ibid.* 530. See *post*, p. 306.



operative only upon the contingency happening of his death without leaving issue (*n*). But a power to appoint by will to those members of a class who might be living at a date beyond the limits of the rule against perpetuities cannot be executed in favour of the class by a will made before the date fixed (*o*).

If the contingency is as to the person, it cannot be executed until the person is ascertained. Thus, a power given to the survivor of two persons cannot be executed by a joint appointment, or by a several appointment, during their joint lives (*p*). But a general power, if to be executed by will, may be well executed by the will of the actual survivor, though made during the joint lives; for the will, as to the property comprised therein, speaks from the death (*q*). A power given to a designated person in the event of his surviving another, if executed during the joint lives, will be effective if the donee be the survivor (*r*).

Power to survivor of two persons.

A power to be exercised within a prescribed period is not well executed by a will, unless the donee of the power die within the period, because the will is not operative until his death (*s*). And where the power was limited to cease in a certain event, *as if the donee were then dead*, a will previously made was held to be no execution, as the will remained revocable (*t*).

Power restricted to certain period or event.

A married woman may execute a power. But her power may be limited so that she can only execute it while unmarried, or during the continuance of a particular coverture, or during the continuance of any coverture. The nature of the power depends upon the wording of the instrument creating it, and it is not possible to reduce the cases to any definite rule (*u*).

Power during coverture, or notwithstanding coverture.

The usual powers in a settlement are impliedly restricted in their execution by the duration of the settlement, or the continuance of the trusts and purposes to which the powers are subservient; and they cannot, in general, be exercised after the vesting in possession of the ultimate remainder in fee, whereby they are rendered no longer necessary (*x*).

Powers in settlement impliedly restricted to purposes of the settlement.

(*n*) *Dalby v. Pullen*, 2 Bing. 144. And as to a power to arise on default of issue, see Sugden, Powers, 267.

(*o*) *Blight v. Hartnoll*, 19 Ch. D. 294; 51 L. J. C. 162.

(*p*) *McAdam v. Logan*, 3 Bro. C. C. 310; *Doe v. Tomkinson*, 2 M. & S. 165; *Hole v. Escott*, 4 M. & Cr. 187. See *Cave v. Cave*, 8 De G. M. & G. 131; *Re Blackburn*, 43 Ch. D. 75; 59 L. J. C. 208.

(*q*) Wills Act, 1837, ss. 24, 27; *Thomas v. Jones*, 1 De G. J. & S. 63; 32 L. J. C. 139.

(*r*) *Sutherland (Countess) v. North-*

*more*, 1 Dick. 56; S. C. nom. *Solater v. Travell*, 3 Vin. Ab. 427, pl. 8. See *Thomas v. Jones*, 1 De G. J. & S. 63; 32 L. J. C. 139.

(*s*) *Cooper v. Martin*, L. R. 3 Ch. 47, and there is no jurisdiction in equity to supply such defect in the execution. 1b. See *post*, 306.

(*t*) *Potts v. Britton*, L. R. 11 Eq. 433.

(*u*) Sugden, Powers, 153 *et seq.*; *Wood v. Wood*, L. R. 10 Eq. 220; 39 L. J. C. 790.

(*x*) Sugden, Powers, 99, 859; see *ante*, pp. 275, 276.

## §§ 2. THE FORM AND CONDITIONS OF EXECUTION.

Forms and conditions prescribed by the power must be strictly complied with.

Power given in general terms.

Power to be executed by deed—by other instrument or writing—will operating as instrument of execution—statutory form of execution by deed.

Power to be executed by will—statutory form of execution by will—execution by will revocable.

Consent required to execution.

Power involving discretion cannot be transferred—power extended to survivors—to heirs or executors—to assigns—execution by attorney.

General power may be transferred—execution by giving power.

Forms prescribed in power must be observed.

The forms and conditions prescribed in the creation of the power for the due execution must be strictly observed;—as that it shall be executed by deed, or will, or writing;—with signature, sealing, delivery;—in the presence or with the attestation of witnesses;—with enrolment, or any other like ceremony;—with the consent of certain persons, or with notice to certain persons, or with any other conditions of the like kind (*a*), or that the instrument executing a general power to appoint by will shall refer to the instrument creating the power (*b*).

Power given in general terms.

A power given in general terms, without any express or implied restriction upon the mode of execution, may be executed by deed or will, or by any writing sufficiently declaring the use or estate appointed (*c*). A recital in a deed, where no special form is necessary, may amount to a sufficient execution of a power (*d*).

Power to be executed by deed.

By other instrument or writing.

A power expressly requiring an execution by deed cannot, in general, be executed by will.—But if the mode of execution be extended in terms to any other instrument or writing, it is not then restricted to a deed, and an instrument intended as a will, whether good or not as such, if answering to the description and complying with the formalities required by the power, may be a sufficient execution (*e*). In this respect, a will attested as being “published, acknowledged and declared” as the testator’s will

Will operating as instrument of execution.

(*a*) Sugden, Powers, 206, 229.

(*b*) *Phillips v. Cayley*, 43 Ch. D. 222; 59 L. J. C. 177; *Re Lane*, [1908] 2 Ch. 581; 77 L. J. C. 774.

(*c*) Sugden, Powers, 135, 203; *Re Jackson's Will*, 13 Ch. D. 189; 49 L. J. C. 82. See *Re Flower*, 55 L. J. C. 200.

(*d*) *Poulson v. Wellington*, 2 P. Wms. 433; *Re Farnell*, 33 Ch. D. 599.

(*e*) Sugden, Powers, 135, 209, 214; *Taylor v. Meads*, 4 De G. J. & S. 597; 34 L. J. C. 203. As to the jurisdiction to aid in the case of a defective execution of a power, see *post*, p. 304.

in the presence of witnesses was held to answer the description of an instrument "delivered" (*f*). But a will not sealed, nor purporting to be sealed, was held not to operate as an instrument "sealed," as required for the execution of a power (*g*).

By the 22 & 23 Vict. c. 35, s. 12, "A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity." A proviso follows saving the effect of any direction in the power as to the consent of any person required, or as to any act having no relation to the mode of executing and attesting the instrument, and also saving an execution conformable with the power (*h*).

Statutory form of execution by deed.

Where the donee of a power is restricted to an appointment by will, he cannot execute it by deed or other instrument having an immediate irrevocable operation, for the intention of the power that the execution should be revocable would be thereby defeated (*i*).

Power to be executed by will

The Wills Act, 1837, (applying to wills made subsequently,) which prescribes a general form for the execution of wills (s. 9), further enacts as to the execution of powers by will (s. 10), "that no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, as far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity" (*k*).

Statutory form of execution by will.

The statute applies only to powers admitting in terms of an

(*f*) *Smith v. Adkins*, L. R. 14 Eq. 402; 41 L. J. C. 628.

(*g*) *Taylor v. Meads*, 4 De G. J. & S. 597; 34 L. J. C. 203, and see the cases there cited.

(*h*) See as to the changes effected by this statutory provision, Sugden, Powers, 234; Carson, Real Prop. Stats. 529. And see *Newton v. Ricketts*, 9 H. L. C. 262.

(*i*) Sugden, Powers, 210; *Proby v. Landor*, 28 Beav. 504; *Re Flower*, 55 L. J. C. 200; *Majoribanks v. Horenden*, Dru. 11. And there is no jurisdiction in equity to aid such an execution of the power, see *post*, p. 306.

(*k*) *Phillips v. Cayley*, 43 Ch. D. 222; 59 L. J. C. 177. See *Re Lane*, [1908] 2 Ch. 581; 77 L. J. C. 774.

execution "by will," and does not extend to powers to be executed by other instruments or writings, though a will might answer the description of such instrument or writing and satisfy the terms of the power; in which case, however, the statute will not obviate the defects of the will as such instrument in not satisfying the requirements of the power (*l*).

Execution by will is revocable.

An appointment by will partakes of the revocable quality of the will itself in which it is made, and, therefore, is not complete until the death of the testator. Consequently it cannot operate in favour of appointees dying before the testator; and a revocation of the will is a revocation of any appointment thereby made (*m*). So it cannot operate as an execution of a power restricted to a certain time, unless the testator die within the time, so that his will may become operative during the continuance of the power (*n*).

Consents required for execution.

The consent of other persons, which may be required as a condition to the execution of the power, must be obtained, and at the time and in the particular form required by the terms of the power; and the death of the person whose consent is so required, or of one of several persons whose joint consent is required, prevents the exercise of the power and so destroys it (*o*).

Power involving discretion cannot be transferred.

"If the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare*" (*p*).—So a power of consent, as a condition to the execution of a power by another, cannot be transferred (*q*). The statutory powers of a tenant for life under the Settled Land Act cannot be assigned (*r*).

Power extended to survivors.

It is sometimes important to consider, especially in the case of trustees, whether a power is exercisable by the persons named, or may be executed by others in a chain of devolution. As regards survivorship, the following rules are laid down by Lord St. Leonards: (1) where a power is given to two or more,

(*l*) *Taylor v. Meads*, 4 De G. J. & S. 597; 34 L. J. C. 203.

(*m*) Sugden, Powers, 458, 460; *Davies' Trusts*, L. R. 13 Eq. 163; 41 L. J. C. 97; *Sotheran v. Dening*, 20 Ch. D. 99; *Re Boyd*, [1897] 2 Ch. 232; 66 L. J. C. 614. See *Re Marten*, [1902] 1 Ch. 314; 71 L. J. C. 203.

(*n*) *Cooper v. Martin*, L. R. 3 Ch. 47. And if the power cease before the death

of the testator, there is no equity in aid of the appointment in his will. See *post*, p. 306.

(*o*) Sugden, Powers, 252, and see the cases there cited.

(*p*) Sugden, Powers, 179, and see the cases there cited. See *Williamson v. Farwell*, 35 Ch. D. 128; 56 L. J. C. 645.

(*q*) *Hawkins v. Kemp*, 3 East, 410.

(*r*) Settled Land Act, 1882, s. 50.

by their proper names, who are not made executors, it will not survive without express words; (2) where it is given to three or more generally, as to "my trustees," "my sons," etc., and not by their proper names, the authority will survive whilst the plural number remains; (3) where the authority is given to "executors," and the will does not expressly point to a joint exercise of it, even a single surviving executor may exercise it; (4) where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive; (5) where the power to executors to sell arises by implication, the power will equally arise to the survivor. The learned author in conclusion repeats the advice of Lord Coke that the power should be extended in express terms to the survivors or survivor(s). In the case of trusts constituted after, or created by instruments coming into operation after, December 31st, 1881, a power may be executed by the survivor or survivors of two or more trustees unless the contrary is expressed in the instrument creating the power (t).

The power may be expressly extended to representatives, as the heirs or executors of the donee, who in such case may execute it; but it is not thereby made assignable (u).

Power extended to heirs or executors.

If the power be expressly extended to the assigns of the donee, it may pass to his assignee in law or in fact, either as annexed to an estate or not, and either in his lifetime or at his death, according to the intention of the instrument creating the power (x). New trustees appointed by the donees of the power for that purpose may exercise the same powers, authorities, and discretions as the original trustees, unless this right is negatived or modified by the instrument creating the trust; and if appointed by the court without this limitation (y).

Power extended to assigns.

The deed or instrument of appointment under a power, when prepared according to the instructions of the donee, may be executed by attorney, there being no discretion involved in the mere act of execution; unless the power prescribe some particular mode of execution inconsistent with such agency. The deed or instrument is in fact that of the principal; it purports to be drawn and executed in his name, though the formal act of execution is by the hand of an attorney (z).

Execution by attorney.

(s) Sugden, Powers, 128. See *ante*, May, 3 K. & J. 585; 26 L. J. C. p. 273, n. (u). 791.

(t) Trustee Act, 1893, s. 22.

(y) Trustee Act, 1893, s. 10, sub-ss. 3, 5, s. 37.

(u) Sugden, Powers, 129—134, and the cases there cited.

(z) Sugden, Powers, 180, 199; see *Berkeley v. Hardy*, 5 B. & C. 355.

(x) Sugden, Powers, 180; *Hall v.*

General power  
may be trans-  
ferred.

A general power, unrestricted as to the objects and as to the execution, may be transferred to another. Thus where an estate is limited generally to such uses as A. shall appoint, he may limit it to such uses as B. shall appoint, and B. will take a general power of appointment. The power in such form is a species of ownership equivalent to the fee simple, involving no trust or discretion except on his own behalf (*a*).

Execution by  
giving power.

A power to appoint generally to or amongst particular objects may be executed by giving to the objects a general power of appointment, for that is equivalent to ownership, and not a delegation of the original power (*b*). So the power may be executed by giving to an object an estate for life with power to appoint by will (*c*); only if the object of the appointment were not living at the time of the creation of the power, the appointment to him of the power by will would be void for remoteness (*d*).

### §§ 3. CONSTRUCTION AND OPERATION OF THE INSTRUMENT OF EXECUTION.

Intention to execute the power—examples.

Conveyance or devise operating as execution of power—where donee of power has no estate—where donee has estate—where donee, having estate, both appoints and conveys.

Statutory effect of general devise in execution of power—power created subsequently to the will.

Construction of the uses and estates appointed.

Partial and repeated execution of power—execution for mortgage or charge only.

Execution with reservation of new powers of revocation and appointment—new powers must be expressly reserved—new power of revocation does not include new appointment—new powers do not require the formalities of the original power—Execution by will revocable without reservation.

Execution subject to a condition.

Intention to  
execute the  
power must  
appear.

An intention to execute a power must appear, but is sufficiently manifested by an instrument which points to the property over which it exists; it need not expressly recite or refer to the power, although it is customary to do so (*a*).

(*a*) Sugden, Powers, 181, 195; see *ante*, p. 284.

(*b*) *Bray v. Bree*, 2 Cl. & F. 453.

(*c*) *Phipson v. Turner*, 9 Sim. 227; *Stark v. Dakyns*, L. R. 10 Ch. 35; 42 L. J. C. 524.

(*d*) *Wollaston v. King*, L. R. 8 Eq.

165; 38 L. J. C. 61, 392; *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. C. 410.

(*a*) Sugden, Powers, 201, 289; *Garth v. Townsend*, L. R. 7 Eq. 220; *Re Farnell*, 33 Ch. D. 599.

A will containing a general expression of intention to execute any disposing power may operate as an execution of a power, general or special, notwithstanding the will contain a general charge of debts, which could not attach on the property appointed, and notwithstanding that it purport to devise a greater estate or to include other persons than the power authorises (*b*). A recital in an instrument to the effect that a person, an object of the power, is entitled to an estate or fund to be appointed may show a sufficient intention to appoint, and if sufficient in respect to form may operate as an appointment (*c*).—Where a person, having a general power over property vested in a trustee, took a transfer of the property from the trustee and executed the deed of transfer, it was held to operate as an execution of the power (*d*).

Examples.

Where a person, having a power to appoint property, executes an instrument (whether a conveyance or will) satisfying the requirements of the power as to form and conditions, it will operate as an execution of the power, although it neither contains a reference to the power, nor expresses an intention to execute the power, if the donee has no property to which a direct conveyance or devise could apply (*e*).

Conveyance or devise operating as execution of a power,—where no estate.

Where a person has a power of appointment and also an estate in the same property, a conveyance or devise, without any reference to the power, operates presumptively upon the estate only, and not as an execution of the power. But if full effect cannot be given to the intended disposition by way of conveyance or devise, the instrument, if sufficient in other respects, may be taken to operate in execution of the power in order to effectuate the general intention (*f*).—Thus, if a tenant for life with a power of leasing grant a lease without reference to the power, such lease, as drawn from his estate, would determine with his life; but, if made in conformity with the power, it may be supported for the whole term as an execution of the power (*g*).

Where donee of power has estate.

(*b*) *Low v. Pennington*, 10 L. J. N. S. C. 83; *Teape's Trusts*, L. R. 16 Eq. 442; 43 L. J. C. 87; *Re Milner*, [1899] 1 Ch. 563; 68 L. J. C. 255; *Re Mayhew*, 70 L. J. C. 428; [1901] 1 Ch. 677; *Re Weston's Sett.*, [1906] 2 Ch. 620; 76 L. J. C. 54.

(*c*) *Wilson v. Piggott*, 2 Ves. jun. 351; *Re Farnell*, 33 Ch. D. 599.

(*d*) *Marler v. Thomas*, L. R. 17 Eq. 8; 43 L. J. C. 73. See *Watts v. Camp-*

*bell*, 2 Giff. 112; *Re Davenport*, [1895] 1 Ch. 361; 64 L. J. C. 252.

(*e*) Sugden, Powers, 289; *Roake v. Denn*, 4 Bli. N. S. 1; *Att.-Gen. v. Wilkinson*, L. R. 2 Eq. 816; *Gratwick's Trusts*, L. R. 1 Eq. 177; *Re Mayhew*, [1901] 1 Ch. 676; 70 L. J. C. 428.

(*f*) *Roake v. Denn*, 4 Bli. N. S. 1; *Sir Edward Clere's Case*, 6 Co. 17. See Sugden, Powers, 347.

(*g*) *Per Parker, C. J., Tomlinson v.*

Execution of power operating as conveyance.

On the other hand, where the instrument is expressly made in execution of the power only, and not as a conveyance of the estate, if it be void in execution of the power, it may be supported as against the appointor out of his interest; but it will not operate as a conveyance contrary to the intention, where the effect of such operation would be prejudicial to the appointee, as by merging a prior interest, or giving a less interest than intended under the power, or where the estate is subject to trusts (*h*).

Where donee of power having estate both appoints and conveys.

Where the donee of a power, having also an estate or interest in the land, both executes the power and conveys the estate, the question may arise whether the instrument operates by way of conveyance or appointment. This is a question of construction with reference to the circumstances, and that construction is to be adopted which will best effectuate the intention of the parties (*i*).—Conveyances are commonly drawn so as to be capable of operating either way, for greater security (*k*).

Statutory effect of general devise as execution of a general power.

By the Wills Act, 1837, s. 27, "a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will;" the section proceeds to enact in the same terms as to personal estate.—If the power requires that the appointment should expressly refer to the power, it is not a general power within the section (*l*). A power to appoint to any person by will only is a general power within the section (*m*); a power to appoint in any manner amongst children is not (*n*). A power to appoint a life estate to a wife cannot be exercised by an appointment of an absolute interest to her (*o*).

This enactment merely expresses the rule of law, where there is no other estate to satisfy the devise; but where the testator has an estate as owner, and also a general power over the same

*Dighton*, 10 Mod. 36; *Campbell v. Leach*, Amb. 740. See *Dyas v. Cruise*, 2 Jo. & Lat. 460.

(*h*) Sugden, Powers, 353; *Roe v. Alp. York*, 6 East, 86; *Bowes v. East London Waterworks*, 3 Madd. 375; Jac. 324.

(*i*) Sugden, Powers, 357, and cases there cited. See *Butler v. Gray*, L. R. 5 Ch. 26; 39 L. J. C. 291.

(*k*) See ante, p. 275.

(*l*) *Phillips v. Cayley*, 43 Ch. D. 222; 59 L. J. C. 377. See *Re Lane*, [1908] 2 Ch. 581; 77 L. J. C. 774.

(*m*) *Re Powell's Trusts*, 39 L. J. C. 188.

(*n*) *Cloves v. Audry*, 12 Beav. 604.

(*o*) *Re Williams*, 42 Ch. D. 93; 58 L. J. C. 451.



or other estates, it alters the previous rule, that a general devise would operate as an appointment only if the intention required it. Under the statute a general devise executes the power unless a contrary intention appear by the will (p).

Under this section a charge of debts or legacies, or other general direction as to the application of the testator's estate, may operate as an execution of a general power of appointment (q). But the execution will extend only so far as necessary to render such directions effectual, and so far as such directions fail by lapse or otherwise the power will remain unexecuted (r).

Direction to pay debts, etc.

The same statute enables a testator to dispose of all the real and personal estate which he shall be entitled to at the time of his death (sect. 3); and further enacts that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (sect. 24).—Hence a general devise may operate in execution of a power created after the date of the will, if it be capable of being so executed; but it may appear from the circumstances, or the language used, that the testator did not intend his previous will to operate in execution of it, in which event it will be so restricted in its operation (s).

Powers created subsequently to the will.

The limitation of the uses or estates appointed in execution of a power is construed by the rules applicable to the instrument of execution, as being a deed or a will. Therefore, if the appointment be by deed, the same technical terms are required, and receive the same construction as in a conveyance of the like estates. If the appointment be by will, the terms of appointment receive the same construction as wills in general (t).—The appointed limitations are construed, in general, in combination with the limitations of the original instrument creating the power and as if inserted therein in place of the power (u).

Construction of uses and estates appointed.

A power of revocation and new appointment may be executed from time to time as to different parts of the land, or as to

Partial execution.

(p) Sugden, Powers, 300; Carson, Real Prop. Stats. 467; *Lake v. Currie*, 2 De G. M. & G. 547. See *Re Jacob*, [1907] 1 Ch. 445; 76 L. J. C. 217.

(q) *Willday v. Barnett*, L. R. 6 Eq. 193; *Re Wilkinson*, L. R. 4 Ch. 587; *Re Pinède's Sett.*, 12 Ch. D. 667; *Re Hodgson*, [1899] 1 Ch. 666; *Re Marten*, [1902] 1 Ch. 314. See *Re Van Hagan*, 16 Ch. D. 18.

(r) *Re Davies' Trusts*, L. R. 13 Eq. 163; 41 L. J. C. 97; *Re Thurston*, 32 Ch. D.

508; 55 L. J. C. 564; *Re Boyd*, [1897] 2 Ch. 232; 66 L. J. C. 614.

(s) *Stillman v. Weedon*, 16 Sim. 26; 18 L. J. C. 46; *Moss v. Harter*, 2 Sm. & G. 458; *Ruding's Settlement*, L. R. 14 Eq. 266; 41 L. J. C. 665; *Pettinger v. Ambler*, L. R. 1 Eq. 510; 35 L. J. C. 389; *Re Hayes*, [1901] 2 Ch. 529. See *Beddington v. Bunmann*, [1903] A. C. 13; 72 L. J. C. 155.

(t) Sugden, Powers, 441.

(u) See *ante*, p. 270.

Repeated execution.

different uses or estates, so long as any power continues. Thus, a general power of appointment may be executed by appointing an estate for life at one time, and the fee at another time. So, a power of jointuring or raising portions may be executed from time to time, as required, up to the limits of the power (*x*).—And an express declaration that the residue of the estate or interest shall go to the remainderman or as in default of appointment is merely a statement of the legal result, and not a complete execution of the power, preventing any further execution of it (*y*).

Execution for mortgage or charge only.

A power may be executed for the whole legal estate, but only partially for the equitable or beneficial estate; as in the case of an appointment in fee by way of mortgage or charge only, the power is wholly executed at law, but only partially in equity, leaving the equity of redemption or the residue of the beneficial interest still subject to the power; but a formal reservation of the equity of redemption may operate as an appointment of the residuary interest, without an express declaration of intention to alter the previous title (*z*).

Execution with power of revocation and new appointment.

A power, whether general or limited, may be executed with the reservation of a power of revocation and new appointment, although no express authority for such reservation be given in the original power; and a like reservation may be made upon every subsequent execution of the power (*a*).—And it seems “that such a power may be reserved upon the execution of even a power simply collateral” (*b*).—“But a power may be so framed as to show that an irrevocable appointment is intended so as to exclude the right to reserve a power of revocation” (*c*).

Power of revocation must be expressly reserved.

Where a power of appointment is executed by deed, without a power of revocation being reserved in the deed, the appointment cannot be revoked, although the original power expressly authorise revocation from time to time (*d*).

Reserved power of revocation does not include new appointment.

The execution of a power to revoke reserved upon the execution of a former power will revive the powers contained in the original settlement, although to the power of revocation there

(*x*) Sugden, Powers, 272; *Digges' Case*, 1 Co. 173 *b*; *Hervey v. Hervey*, 1 Atk. 561; *Zouch v. Woolston*, 2 Burr. 1136; 1 W. Bl. 281; *Cunninghame v. Anstruther*, L. R. 2 H. L. Sc. 223. See *Webster v. Boddington*, 16 Sim. 177; *Versturme v. Gardiner*, 17 Beav. 338.

(*y*) Sugden, Powers, 82; *Zouch v. Woolston*, 2 Burr. 1136; 1 W. Bl. 281. See *Dow v. Milborne*, 2 T. R. 719.

(*z*) Sugden, Powers, 273, 274; *Innes v. Jackson*, 16 Ves. 356; 1 Bligh, 104.

See *ante*, p. 208.

(*a*) Sugden, Powers, 367; *Adams v. Adams*, Comp. 651.

(*b*) Sugden, Powers, 389. See *ante*, p. 279.

(*c*) Sugden, Powers, 389.

(*d*) Sugden, Powers, 369; *Hele v. Bond*, Sugden, App. 908; *Free. Ch.* 474; *Re Hancock*, [1896] 2 Ch. 173; 65 L. J. C. 690. See *Turback v. Marbury*, 2 Vern. 511 and note.

be not added an express power to appoint new uses, unless the appointment be destructive of the original settlement. In the latter case, if a power of revocation be reserved, or if executed, a power to appoint new uses be not also reserved, the seisin will vest in the settlor under the doctrine of resulting uses (*e*), and upon an attempted execution of the original power there would be no seisin to serve the new uses declared (*f*).—An original power in a settlement reserved to the settlor to revoke the uses authorises a new appointment without further reservation (*g*).

New powers of revocation and appointment reserved upon the execution of an original power are restricted in extent of operation and as to the objects of appointment by the terms of the original power; but they are not restricted in execution by the formalities required by that power. These formalities may be altogether omitted, and the new powers executed in compliance with those formalities and conditions only which may be prescribed in the terms of their reservation (*h*).

New powers not restricted by formalities of original power.

An execution by will is always revocable by the nature of the instrument, without any express reservation of a power to revoke; and a new appointment may be made at any time by a subsequent will (*i*).

Execution by will always revocable.

A power may be executed conditionally, so as not to take effect until a future time or event; or to be subject to revocation by a future event (*k*). Thus, an appointment by will, reciting that the appointor had then no children, was construed to be conditional on there being no children; so that, upon children being born, the appointment was inoperative, and the children became entitled under a limitation to them in default of appointment (*l*). In settlements of land a power is usually given to raise sums of money charged upon the settled estates to be paid to those who will not come into possession of the lands under the limitations of the settlement. These sums of money are known as portions for younger children, and an appointment made to a younger child is impliedly conditional upon his continuing to fill that character until the time of payment; and upon his becoming the eldest son in the lifetime of the parent the appointment becomes

Execution subject to a condition.

(*e*) See *ante*, pp. 83, 254.

(*f*) *Ward v. Lenthall*, 1 Sid. 343; 2 Keb. 269; *Montagu v. Kater*, 8 Ex. 507; 22 L. J. Ex. 154; *Saunders v. Evans*, 8 H. L. C. 721; 31 L. J. C. 233. See Sugden, Powers, 373—386.

(*g*) Sugden, Powers, 371, 375; *Witham v. Bland*, 1 Ch. Ca. 241; 3 Swanst. 277, *u*.

(*h*) Sugden, Powers, 366. See *Adams v. Adams*, Cowp. 651; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382.

(*i*) Sugden, Powers, 387. See *ante*, p. 292.

(*k*) Sugden, Powers, 362.

(*l*) *Jefferys' Trusts*, L. R. 14 Eq. 136; 42 L. J. C. 17.

void, and a new appointment may be made of that portion (*m*).—Under a power of appointment to children, who were also entitled in default of appointment, an appointment was made of a share to one upon terms that in case of no complete appointment it should be in place of all claim of the appointee against the property; it was held that such appointment in the event excluded the appointee from any further claim, and impliedly appointed the residue to the other children (*n*).

#### §§ 4. EXECUTION IN EXCESS OF POWER.

Excess as to the objects of the power—appointment amongst persons, some of whom are strangers to the power—appointment to object, with appointment over to stranger—appointment to stranger with appointment over to object.

Appointment to child for life with remainder to his children or issue, not objects—estate tail by *cy-pres* doctrine.

Excess in the estate appointed—lease in excess of power—charge in excess of power.

Appointment with directions and conditions in excess of power—direction that appointed property be settled—invalid directions inseparable from appointment.

Execution in excess of power.

An appointment in excess of or deviating from the power is, in general, wholly void; but if the excess or deviation can be ascertained and separated from the rest of the appointment, it is void to that extent only. The excess or deviation may be in the objects to whom the appointment is made;—in the estates or interests appointed;—in conditions or qualifications annexed to the appointment (*a*).

Appointment amongst persons some of whom not objects.

An appointment made distributively amongst persons, some of whom are objects of the power and some not, may be void *in toto* from uncertainty as to what share the proper objects should take; but such an appointment may be supported as to the objects within the power, if it can be taken as in effect distributing

(*m*) Sugden, Powers, 619; *Chadwick v. Doleman*, 2 Vern. 528; *Teynham (Lord) v. Webb*, 2 Ves. sen. 198; *Re Bayley's Settlement*, L. R. 6 Ch. 590. See *Domville v. Winnington*, 26 Ch. 382; 53 L. J. C. 782; *Shuttleworth v. Murray*, [1901] 1 Ch. 819; 70 L. J. C. 453; *affd. nom. Law Union and Crown Insec. v. Hill*, [1902] A. C. 263; 71 L. J. C. 602.

(*n*) *Foster v. Cautley*, 6 D. M. & G.

55.

(*a*) Sugden, Powers, 498. An execution in excess of the power may be sometimes enforced against the person taking in default of appointment under the equitable doctrine of election, which does not fall within the scope of this work. Sugden, Powers, 578; notes to *Streetfield v. Streetfield*, Cas. t. Talb. 176; 1 Wh. & T. L. C. Eq. 416.

the property amongst those objects exclusively, or as giving to them specific or ascertainable shares (*b*).

Where an appointment is made to an object of the power, with an ulterior appointment, either by way of remainder or executory limitation, to a person not being an object of the power, the latter appointment only is void, and the prior appointment may stand (*c*).—But where the ulterior appointment is by way of executory limitation in defeasance of the prior appointment, it may in some cases operate by construction as a conditional limitation of the preceding estate and determine it in the event, though inoperative to pass the estate to the appointee as intended. It may express the intention that the former estate is to cease in the event prescribed, though it fail of further operative effect by reason of the incapacity of the appointee (*d*).

Appointment to object with appointment over to stranger.

An appointment to a person not within the power followed by an appointment over to an object of the power, either by way of remainder or executory limitation, is void as to the prior appointment but may take effect as to the appointment over.—The ulterior appointment, however, if limited by way of remainder, does not admit of acceleration by removal of the preceding estate; for the prior appointment, though it be made in the form of a particular estate, is wholly void, and leaves only the ulterior appointment, limited to take effect at the period or event prescribed for the determination of the void limitation. In all cases therefore the ulterior appointment can be supported only as an executory limitation, and if it be valid as such, it may take effect in due course, and in the event immediately, or upon the determination of a prior estate validly appointed; but until it takes effect, the estate goes as in default of appointment (*e*).

Appointment to stranger with appointment over to object.

A power to appoint to children does not extend to grandchildren; therefore an appointment under such a power to a child for life, with remainder to his children or issue is void as to the remainder to the children of issue, who are incapable of taking under the power (*f*).

Appointment to child for life with remainder to his children or issue, not objects.

(*b*) Sugden, Powers, 504; *Sadler v. Pratt*, 5 Sim. 632; *Brown's Trusts*, L. R. 1 Eq. 74; *Bruce v. Bruce*, L. R. 11 Eq. 371; 40 L. J. C. 141; *Re Kerr's Trusts*, 46 L. J. C. 287; 4 Ch. D. 600; *Re Perkins*, [1893] 1 Ch. 283; 62 L. J. C. 531.

(*c*) Sugden, Powers, 503, 511; *Adams v. Adams*, Cowp. 651; *Brown v. Nisbett*, 1 Cox, 13. See *Re Porter's Settlement*, 45 Ch. D. 179; 59 L. J. C. 595.

(*d*) *Doe v. Eyre*, 5 C. B. 713; Sugden, Powers, 512—514. See *ante*, p. 262.

(*e*) Sugden, Powers, 508, 515; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; *Crompton v. Barrow*, 4 Ves. 681; *Crozier v. Crozier*, 3 Dr. & War. 353; *Craven v. Brady*, L. R. 4 Ch. 296; 38 L. J. C. 345; *Re Swinburne*, 27 Ch. D. 696; 54 L. J. C. 229; *Williamson v. Farwell*, 35 Ch. D. 128; 56 L. J. C. 645. See *Re Hunt*, 31 Ch. D. 308; 55 L. J. C. 280.

(*f*) See *ante*, p. 281; Sugden, Powers, 503; *Adams v. Adams*, Cowp. 651; *Brudenell v. Elwes*, 1 East, 442; 7 Ves.

Construed as  
an estate tail  
by the *cy-pres*  
doctrine.

But where such an appointment is made by will and the remainder is appointed to the children or issue in a manner showing an intention that they should take in a course of descent, it is construed to give an estate tail to the parent, in order to effectuate the general intention of the testator. This is an application of the *cy-pres* doctrine already explained, which applies to wills, whether devising directly or in execution of a power (*g*). The same construction is not admitted in appointments by deed (*h*).

Excess in  
estate or  
interest ap-  
pointed.

Where a power authorises not merely the appointment of the land, but fixes the estate which may be appointed, an appointment of a greater (or less) estate is an invalid execution of the power, as an appointment of the fee or of an estate tail under a power to appoint for life, or, it has been said, of an estate for life under a power to appoint an estate tail (*i*).—A power to appoint to a particular object was not well executed at law by appointing to a trustee for that object, but a similar appointment was valid in equity, and the equitable rule must now prevail since the Judicature Acts (*k*).

Equitable  
estate instead  
of legal.

Lease in ex-  
cess of term.

Under a power to lease for a certain term, as twenty-one years, a lease for twenty-two years or any greater term is wholly void at law; but in equity it is void only for the excess and is supported as a valid execution of the power for the term authorised (*l*). A power to lease for a certain term authorises a lease for a less term (*m*).

Lease in re-  
version.

Under a power to lease in possession a lease appointed to commence *in futuro* is void, both at law and in equity (*n*); and a power of leasing in general terms presumptively authorises only leases in possession; and such a power does not authorise leases in reversion, nor, it seems, future or concurrent leases without

382. As to the circumstances under which a case of election will arise, see notes to *Streetfield v. Streetfield*, Cas. t. Talb. 176; 1 Wh. & T. L. C. Eq. 416.

(*g*) Sugden, Powers, 498 *et seq.*; *Line v. Hall*, 43 L. J. C. 107; *Re Rising*, [1904] 1 Ch. 533; 73 L. J. C. 455. See *ante*, p. 243.

(*h*) *Adams v. Adams*, Cowp. 651; *Brudenell v. Elwes*, 1 East, 451.

(*i*) Sugden, Powers, 522—525, and the cases there cited; *Re Porter's Settlement*, 45 Ch. D. 179; 59 L. J. C. 595. But see as to the latter point, *Isherwood v. Oldknow*, 3 M. & S. 382; Sugden, Powers, 411.

(*k*) *Churchman v. Harvey*, Ambl. 335; *Wykham v. Wykham*, 18 Ves. 395;

*Scotney v. Lomer*, 29 Ch. D. 535; 54 L. J. C. 558. See *Re Redgate*, [1903] 1 Ch. 356; 72 L. J. C. 204.

(*l*) Sugden, Powers, 519; *Campbell v. Leach*, Ambl. 740; *Roe v. Pridcaux*, 10 East, 158. As to the execution of powers of leasing, see Sugden, Powers, p. 711. As to reservation of rent and conditions under a power of leasing, see *ante*, p. 285; and as to statutory relief against defects in leases under powers, see *post*, p. 309.

(*m*) *Isherwood v. Oldknow*, 3 M. & S. 382.

(*n*) Sugden, Powers, 520, 760; *Bowes v. East London Waterworks*, Jacob, 375; *Doe v. Culvert*, 2 East, 376. See *Doe v. Day*, 10 East, 427.

special words for that purpose (*o*). But a contract to execute a lease at a future time may be specifically enforced, as may also a covenant for renewal, if at the date when performance may be required the power still subsists, and the proposed lease be conformable to the power (*p*).

Under a power to charge a certain sum on land a charge of a larger sum is void only for the excess (*q*). Charge in excess of power.

If there be annexed to an appointment conditions, directions, or qualifications which are not authorised by the power, the appointment, if it can be distinguished and separated from the unauthorised terms, may stand unaffected by them; but if incapable of being severed the appointment will be absolutely void (*r*).—Thus a direction annexed to the appointment that the appointee should share with a person not an object of the power is void and may be rejected (*s*).—So directions not authorised by the power as to the time of vesting (*t*).—So a direction that the appointment be accepted in satisfaction of a debt, or that it be charged with debts, or that the appointee release a debt or pay debts (*u*);—and the appointment in such cases will stand good. Appointment with directions and conditions in excess of power.  
Condition that person not an object participate.  
Condition that debts be released or paid.

Where under a power to appoint to children, the appointment of a share is qualified by a direction that it shall be held in trust or settled in a manner to give a benefit to the children or issue of the appointee, or any other persons who are incapable of taking under the power, such direction is, in general, void and inoperative, and the appointment is good and absolute (*x*).—If the appointee be a party to the instrument of appointment containing such direction or qualification, the latter may be supported as an independent disposition by him of the appointed share; as in the case of the marriage settlement of a child to whom an Condition that appointed share be settled, etc.  
Appointment combined with settlement by appointee.

(*o*) Sugden, Powers, 749, 752, 776; 443.  
*Roe v. Prideaux*, 10 East, 181.

(*p*) *Shannon v. Bradstreet*, 1 Sch. & L. 52; *Dowell v. Dew*, 1 Y. & C. Ch. 345; affd. 12 L. J. C. 158; *Gas Light and Coke Co. v. Twose*, 35 Ch. D. 519; 56 L. J. C. 889. See *Clark v. Smith*, 9 Cl. & F. 126.

(*q*) Sugden, Powers, 521; *Parker v. Parker*, Gilb. 168; *Hervey v. Hervey*, 1 Atk. 561, case of excessive jointure.

(*r*) Sugden, Powers, 526; *Re Perkins*, [1893] 1 Ch. 283; 62 L. J. C. 531; *Webb v. Sadler*, L. R. 8 Ch. 419; 42 L. J. C. 498.

(*s*) *Sadler v. Pratt*, 5 Sim. 632. See *Stroud v. Norman*, Kay, 313; 23 L. J. C.

(*t*) *Dillon v. Dillon*, 1 Ball & B. 77.

(*u*) *Roberts v. Dicall*, 2 Eq. Ca. Abr. 668; *Cowx v. Foster*, 1 J. & H. 30; 29 L. J. C. 886; *Ferrier v. Jay*, L. R. 10 Eq. 550; 39 L. J. C. 686; *White v. White*, 22 Ch. D. 555. See Sugden, Powers, 528.

(*x*) Sugden, Powers, 516, 664; *Watt v. Creyke*, 3 Sm. & G. 362; 26 L. J. C. 211; *Woolbridge v. Woolbridge*, Johns. 63; 28 L. J. C. 689; *Churchill v. Churchill*, L. R. 5 Eq. 44; 37 L. J. C. 92; and there is no election in such cases in favour of the grandchildren or issue, *Ib*.

appointment is made in the form of a settlement of the share upon the issue of the marriage (y).

Invalid direc-  
tions in-  
separable  
from appoint-  
ment.

But it is a question of construction whether upon the whole instrument the directions which are invalid form] a substantive part of the appointment so as to invalidate it, wholly or so far as they extend (z).

#### § 4. EQUITABLE JURISDICTION OVER POWERS.

##### §§ 1. JURISDICTION IN AID OF EXECUTION.

Defective execution aided in favour of purchaser, wife, child, etc.—against persons claiming in default of appointment.

Defects of form aided—execution by will instead of deed—by deed instead of will.

Non-execution or defective intention not aided.

Covenant or contract to execute a power enforced in equity—covenant to execute future power—covenant to appoint satisfied by allowing estate to pass in default of appointment.

Powers held in trust enforced in equity—trust for creditors raised by appointment to a volunteer.

Statutory relief against defects in leases under powers.

Defective  
execution  
supplied.

Where an intended appointment fails at law from defect in the form or manner of execution required by the power, a court of equity, considering the claim of the appointee in certain cases to be preferable to that of the person becoming entitled in default of appointment, will aid the defective execution by compelling a transfer of the legal estate according to the intention of the appointment (a).

For pur-  
chasers, etc.

A defective execution is thus aided in equity in favour of persons who have given value for the appointment, as purchasers or lessees, mortgagees and creditors; but not at the suit of

Wife or child.

persons claiming without any consideration;—also in favour of persons for whom the appointor is considered especially bound by relationship to make provision, as a wife, but not in favour

(y) Sugden, Powers, 670; *Thompson v. Simpson*, 1 Dr. & War. 459. See *Morgan v. Gironow*, L. R. 16 Eq. 1; 42 L. J. C. 410; *Cooper v. Cooper*, L. R. 5 Ch. 203; 39 L. J. C. 240, where the appointment was made to the daughter a minor on her marriage and the settlement made by her husband, giving a reversionary interest to the appointor; the appointment was supported.

(z) Sugden, Powers, 518, 529; *Rucker v. Scholefield*, 1 H. & M. 36; 32 L. J. C. 46; *Webb v. Sadler*, L. R. 8 Ch. 419; 42 L. J. C. 498; *Scotney v. Lomer*, 29 Ch. D. 535; 54 L. J. C. 558; *Re Perkins' Settlement*, [1893] 1 Ch. 283; 62 L. J. C. 531.

(a) Sugden, Powers, 530; notes to *Tollet v. Tollet*, 2 P. Wms. 489; 2 Wh. & T. L. C. Eq. 289.



of a husband; a child, but not a grandchild;—nor a father or mother, brother or sister, or more distant relation (*b*).

This equity is not extended to an illegitimate child (*c*). A power of appointment to children *primâ facie* extends to legitimate children only; and where a power is sufficiently general to include illegitimate children, they must be aptly designated in the execution of the power in order to take as appointees (*d*).

Illegitimate child.

This jurisdiction is exercised against the persons taking in default of appointment, whether by express limitation or by act of law, and although such persons are objects of the power equally with the appointee. It is also exercised against purchasers for value claiming under the settlement, as their claim is subject to the power (*e*). But a purchaser for value from an appointee under a defective execution is in no better position than the appointee from whom he derives title (*f*).

Against persons claiming in default of appointment.

The defects aided in equity are omissions in the form or manner of execution required by the power, as signing, sealing, the presence of witnesses, attestation, and the like; all which, it has been observed, are immaterial except as prescribed arbitrarily by the donor of the power (*g*).

Defects of form supplied.

A power of appointment by deed may be well executed in the form prescribed by 22 & 23 Vict. c. 35, s. 12, so far as respects the execution and attestation thereof, although additional or other forms of execution be required by the power, and the aid of equity is so far not required (*h*).

In deeds.

The execution of a power by will is now regulated by 1 Vict. c. 26, s. 10, by which a will executed as required by the Act is made necessary and sufficient, so far as respects the execution and attestation thereof; and, therefore, no relief can be given in equity against the requirements of the statute (*i*).

In wills

(*b*) Sugden, Powers, 533—535; *Tollet v. Tollet*, 2 P. Wms. 489; 1 Wh. & T. L. C. Eq. 287. Also in favour of an appointment to charitable uses, *Innes v. Sayer*, 7 Hare, 377; 3 Mac. & G. 606; Sugden, Powers, 208. In some cases a defective appointment caused by fraud or accident may be aided under the general doctrines of equity, though the appointees do not answer to any of the above descriptions. Sugden, Powers, 572.

(*c*) Sugden, Powers, 535; *Bramhall v. Hall*, 2 Eden, 220. See *Occleston v. Fullalove*, L. R. 9 Ch. 147; L. R. 7 H. L. 568.

(*d*) *Re Kerr's Trusts*, 4 Ch. D. 600; 46 L. J. C. 287. See *ante*, p. 268.

(*e*) Sugden, Powers, 542—547; *Tollet v. Tollet*, 2 P. Wms. 489; 2 Wh. & T. L. C. Eq. 289 and notes. As to the equity against an heir, being a child of the appointor and not otherwise provided for than by the inheritance in default of appointment, see Sugden, Powers, 545.

(*f*) Sugden, Powers, 542.

(*g*) Sugden, Powers, 558, 560. See *ante*, p. 290.

(*h*) Carson, Real Prop. Stats. 529. See *ante*, p. 291.

(*i*) Sugden, Powers, 559. See *Gullan v. Grove*, 26 Beav. 64; *Re Broad*, [1901] 2 Ch. 86; 70 L. J. C. 601; *Re Burnett*, [1908] 1 Ch. 402; 77 L. J. C. 267. And see *ante*, p. 291.

Execution by will instead of deed.

It is a general rule that in favour of a proper object, as a wife or child, a court of equity will supply the defect, where a power which ought to have been executed by deed has been executed by will; if there be nothing in the instrument creating the power to mark the intention of the donor of the power, beyond the fact that he has pointed to a deed as the mode of executing the power.—But it is competent to the donor of a power to make the nature and character of the instrument by which it is to be executed of the essence of the power, without which no execution shall be valid (*k*).

If the power be limited in duration, and expire before the death of the donee, his will, which can only take effect upon the happening of that event, is no execution of the power, although it be made during the subsistence of the power and purporting to execute it, for the court cannot supply the want of execution (*l*).

Execution by deed instead of will.

A power to appoint by will only cannot be executed by a deed, or by any act to take effect in the lifetime of the donee of the power; nor can such execution be aided or supported in equity, for the intention that the power should continue revocable would be thereby defeated (*m*).

No relief against non-execution or defective intention.

The intention to execute the power must sufficiently appear, in whatever form, in order to call for the aid of equity; for the court will in no case supply the non-execution of a power, or what is the same thing, a defect in the intention to execute (*n*).

Covenant or contract to appoint enforced in equity.

Where a power authorises an appointment by deed or other act *inter vivos*, a covenant or valid contract will be enforced in equity; and will thus operate in a manner equivalent to an appointment, in favour of persons for whom a defective execution would be supplied, and upon the same principles. "Contracts are considered as defective executions, and require a sufficient consideration to enable the court to act" (*o*).—A contract to

(*k*) Sugden, Powers, 558. See *per* Rolt, L. J., in *Cooper v. Martin*, L. R. 3 Ch. 47, 57; *Bruce v. Bruce*, L. R. 11 Eq. 371; 40 L. J. C. 141; *Tollet v. Tollet*, 2 P. Wms. 489; 2 Wh. & T. L. C. Eq. 289.

(*l*) *Cooper v. Martin*, L. R. 3 Ch. 47; *Potts v. Britton*, L. R. 11 Eq. 433. See *Tollet v. Tollet*, 2 P. Wms. 489; 2 Wh. & T. L. C. Eq. 289.

(*m*) Sugden, Powers, 560; *Reid v. Shergold*, 10 Ves. 370; *per* Rolt, L. J., *Martin v. Cooper*, L. R. 3 Ch. 47. See *Gullan v. Grove*, 26 Beav. 64; *Re*

*Broad*, [1901] 2 Ch. 86; 70 L. J. C. 601; *Re Barnett*, [1908] 1 Ch. 402; 77 L. J. C. 267.

(*n*) Sugden, Powers, 588; *Tollet v. Tollet*, 2 P. Wms. 489; 2 Wh. & T. L. C. Eq. 289; *Re Wickes' Settlement*, [1897] 1 Ch. 289. See *Johnson v. Bragge*, [1901] 1 Ch. 28; 70 L. J. C. 41. As to informal, but sufficient executions, see *ante*, p. 295.

(*o*) Sugden, Powers, 550, 552; notes to *Tollet v. Tollet*, 2 P. Wms. 489; 2 Wh. & T. L. C. Eq. 289.

execute a power may be enforced against the remainder-man or those taking in default of appointment; so where it can be executed in their favour, as in the case of a contract to take a lease or to purchase the estate, the court will compel an execution of it on their behalf (*p*). Contracts respecting the execution of powers conferred upon tenants for life by the Settled Land Acts, 1882 to 1890, bind the settled land and are enforceable by or against those entitled in remainder (*q*).

The agreement to appoint an interest in land must be in writing, in order to satisfy the Statute of Frauds (*r*). Part performance of a parol agreement by the intended appointee will take the case out of the statute as against the party contracting to execute the power; but as against the remainder-man, part performance will have no effect, unless it has been performed upon the faith of some act of acquiescence or permission on his part, or unless the acts of part performance have taken place in the lifetime of the donee of the power, and the contract would have been in fact enforceable against him (*s*).

Agreement must be in writing.  
Effect of part performance of parol agreement.

A recital in an instrument, to which the donee is a party, that an object of the power is entitled to a certain estate or interest in the property subject to the power, which the instrument proceeds to deal with, if the instrument in other respects satisfy the requirements of the power, may operate as a direct and perfect appointment, in law as well as in equity, or as an enforceable agreement to appoint, and now binding in all courts as an equitable appointment (*t*).

Recital showing intention to execute.

A covenant is a sufficient declaration of intention to execute, and will be enforced in equity, even when made before the power arose, as where a power is limited to be exercised by a tenant for life in possession, and he covenants that when he comes into possession he will execute the power (*u*). Thus, a power given to the successive tenants for life under a settlement as and when they should be in possession to appoint a jointure, will be executed by a covenant by a tenant for life in remainder that if he should come into possession he would execute the power; or

Covenant to execute future power.

(*p*) Sugden, Powers, 557.

(*q*) Settled Land Act, 1882, s. 31.

(*r*) Sugden, Powers, 554; *Blore v. Sutton*, 3 Mer. 237. See *Johnson v. Bragge*, [1901] 1 Ch. 28; 70 L. J. C. 41.

(*s*) Sugden, Powers, 555; *Blore v. Sutton*, 3 Mer. 237; *Shannon v. Bradstreet*, 1 Sch. & L. 52; *Dowell v. Dew*, 1 Y. & C. Ch. 345; affd. 12 L. J. C. 158. See *Morgan v. Milman*, 3 D. M. & G.

24; 22 L. J. C. 897.

(*t*) Sugden, Powers, 550; *Wilson v. Piggott*, 2 Ves. jun. 351; *Skipwith v. Shirley*, 11 Ves. 64; *Dyne v. Costabadie*, 17 Beav. 140; 22 L. J. C. 66.

(*u*) *Per* Lord Redesdale, *Shannon v. Bradstreet*, 1 Sch. & L. 63; see *Dowell v. Dew*, 1 Y. & C. Ch. 345; affd. 12 L. J. C. 158. As to leases granted in intended exercise of power, before acquiring the power, see *post*, p. 310.

even by a covenant to charge a jointure on an expectancy afterwards realised by a devise from a testator living when the covenant was entered into (*x*).—So where a power was given to a person to be exercised after he should attain the age of twenty-five years and not before, and a covenant to appoint was made before that age; it was held, upon his attaining that age, to be a valid execution in equity (*y*).

A covenant to execute a power, to be executed by will only, in favour of particular objects, cannot be enforced; for such a covenant, if valid, would enable the donee to defeat the intention of the power by making an irrevocable appointment (*z*). A general power is for most purposes equivalent to property (*a*), but a covenant to execute a general testamentary power, although not invalid unless it appeared that the power only authorised an appointment by a revocable instrument operative only upon the death of the donee, will not be specifically enforced (*b*).

A covenant to appoint is satisfied in equity by allowing the property to pass to the same object for the same estate by default of appointment (*c*).

A covenant not to execute a power may operate in equity as a release of the power (*d*);—and a recital in a deed to that effect may operate as a release (*e*).

Contract satisfied by allowing estate to pass in default of appointment. Covenant not to execute.

Powers held in trust executed in equity.

A power held in trust without any discretion as to its exercise will be enforced in equity in conformity with the trust, although not executed by the donee of the power;—as a power in trustees or executors to sell the property and apply the proceeds upon trusts; and if the trustee die without executing the power, or if no trustee be appointed to execute it, the court will order a sale and compel the heir to join in conveying (*f*); but the court will not execute or control a discretionary power (*g*).

Where a person having a general power of appointment executes it effectually in favour of a volunteer, whether by deed

Trust for creditors created by appointment to volunteer.

(*x*) *Affleck v. Affleck*, 3 Sm. & Giff. 394; 26 L. J. C. 358; *Charlton v. Charlton*, [1906] 2 Ch. 523; 75 L. J. C. 715.

(*y*) *Johnson v. Touchet*, 37 L. J. C. 25.

(*z*) *Re Bradshaw*, [1902] 1 Ch. 436; 71 L. J. C. 230.

(*a*) Sugden, Powers, 181, 195, 394.

(*b*) Sugden, Powers, 560; *Irid v. Shergold*, 10 Ves. 370; *Re Parkin*, [1892] 3 Ch. 510; 62 L. J. C. 55.

(*c*) *Thacker v. Key*, L. R. 8 Eq. 408; see *Blandy v. Widmore*, 1 P. Wms. 324; 2 Wh. & T. L. C. Eq. 407.

(*d*) *Davies v. Huguenin*, 1 H. & M.

730; 32 L. J. C. 417; *Isaac v. Hughes*, L. R. 9 Eq. 191; 39 L. J. C. 379. See *Hurst v. Hurst*, 16 Beav. 372; 22 L. J. C. 538; *Walford v. Gray*, 11 Jur. N. S. 743.

(*e*) *Boyd v. Petrie*, L. R. 7 Ch. 385; 41 L. J. C. 378.

(*f*) Sugden, Powers, 588; and see the cases there cited; see *Brown v. Higgs*, 8 Ves. 561, 574; as to an implied gift or trust for the objects of the power in default of appointment, see *ante*, p. 282.

(*g*) Sugden, Powers, 258, 659.

or will, a trust is thereby created for his creditors, and the appointed property is made assets in equity for payment of his debts; though in the administration of the assets of a deceased debtor the property so appointed will not be resorted to until the property descended or devised has been exhausted. If the power be not executed or be defectively executed, there is no jurisdiction in aid of the execution, and no such trust arises for creditors, as against those entitled in default of appointment (*h*).

No such trust if execution defective.

But a purchaser for a valuable consideration from the appointee, having a specific claim on the property, is not affected by the general charge of the creditors; and a settlement of the appointed property upon the marriage of the appointee would also be supported against them (*i*).

Nor against purchaser from appointee.

Execution may be had by a judgment creditor against any lands over which the debtor has any disposing power which he may exercise for his own benefit; but the judgment does not operate as a charge upon the land as against a purchaser for value until the writ is registered in the Land Registry (*k*).

Execution against land subject to power.

Statutory relief is provided against defects in leases granted by persons having valid powers of leasing in certain cases by 12 & 13 Vict. c. 26, amended by 13 & 14 Vict. c. 17. Sect. 2 enacts "that where in the intended exercise of any such power of leasing, whether derived under an Act of Parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition, or restriction, or by reason of any other deviation from the terms of the power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bonâ fide*, and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require) have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee, his heirs,

Statutory relief against defects in leases under powers.

Defective lease considered in equity as a contract.

(*h*) Sugden, Powers, 474, 540, 588; *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206; *Fleming v. Buchanan*, 3 D. M. & G. 976; 22 L. J. C. 886; *Beffus v. Lawley*, [1903] A. C. 411; 72 L. J. C. 781.

(*i*) *George v. Milbanke*, 9 Ves. 190. See *Aldbrough (Lord) v. Trye*, 9 Cl. &

F. 436; *Halifax Joint Stock Bank v. Gledhill*, [1891] 1 Ch. 31; 60 L. J. C. 181.

(*k*) 1 & 2 Vict. c. 110, s. 11; 51 & 52 Vict. c. 51, ss. 5, 6; 63 & 64 Vict. c. 26, s. 3. See Carson, Real Prop. Stats. 483 *et seq.*

executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: provided always, that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation."

Proviso where lease may be confirmed.

Confirmation by acceptance of rent.

By sects. 1 and 2 of 13 & 14 Vict. c. 17, which replace sect. 3 of the earlier Act, the acceptance of rent shall be deemed a confirmation of such lease, if accompanied with a signed receipt or note in writing confirming such lease. By the later Act, sect. 3, where the reversioner is able and willing to confirm, the lessee is bound to accept the confirmation.

Lease may become valid by subsequent power.

By sect. 4 of 12 & 13 Vict. c. 26, "where a lease granted in the intended exercise of any such power of leasing is invalid by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease."

Lease supported by power though not referred to.

By sect. 5 of the same statute, "when a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise) cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this Act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease" (l).

(l) *Ex p. Cooper*, 2 Dr. & Sm. 312; 34 L. J. C. 373; *Hallett to Martin*, 24 Ch. D. 624; 52 L. J. C. 804; *Gus Light and Coke Co. v. Towse*, 35 Ch. D.

519; 56 L. J. C. 889. And see the effect of these enactments stated and commented on in Sugden, Powers, 571.

## §§ 2. JURISDICTION TO SET ASIDE EXECUTION.

Execution in fraud of the power set aside in equity—examples—motive distinguished from purpose of execution.

Appointment to child in consideration of benefit to parent—consideration paid by a third party.

Appointment for the purpose of disposing to a person not an object of the power.

Appointment for ulterior purpose consistent with the power.

Execution partly in fraud of the power—appointment of jointure in excess of interest given to wife—appointment to one of children in fraud of the power.

Subsequent execution after prior invalid appointment.

Purchaser from appointee under fraudulent appointment.

Illusory appointment under non-exclusive power.

The execution must be within the purpose and intention of the power, which is to be collected from the true construction of the instrument creating it, without regard to any purpose or design of the donor not therein expressed; and if an appointment, though correct in point of form and operative at law, be made for any indirect or ulterior purpose not warranted by the power, it will be set aside in equity as a fraud on the power (*a*).

Execution in fraud of power set aside.

Thus, where a parent, having a power of appointment amongst his children, and being desirous of preventing one of his daughters from marrying a particular person, for that purpose appointed the portion intended for that daughter to one of his sons, upon a trust or understanding that his son should retain the control over it, and withhold it or not from the daughter according to the event; the appointment was held to be a fraud on the power and void. In the same case the parent, in pursuance of the same purpose, made a settlement of property with a power of appointment in favour of the daughter, but upon an understanding, and with the direction to the donee of the power, that he should execute in a manner to promote such purpose, which, however, was not expressed in the deed; it was held that the intention of the power was to be collected from the instrument creating it only, and that extrinsic evidence of the purpose of the donor was inadmissible; but that such evidence was admissible to show the purpose for which the power was in fact

(*a*) *Portland (Duke) v. Topham*, 11 L. J. C. 259; Sugden, Powers, 606; H. L. C. 32; 34 L. J. C. 113; *Topham* notes to *Aleyn v. Belchier*, 1 Eden, 132; *v. Portland (Duke)*, L. R. 5 Ch. 40; 39 2 Wh. & T. L. C. Eq. 308.

executed, and that the execution, being in pursuance of a purpose not authorised by the power, was void (*b*).

Upon the same principle, where a father, having a power of appointment amongst children, appointed to one who was a lunatic and likely to die, for the purpose of himself succeeding to the appointed share as his representative, the appointment was held to be fraudulent against the other objects of the power and void (*c*). But an appointment made in favour of an infant then in good health, is not invalid unless, in fact, fraudulent, although by reason of the death of the appointee in infancy, the father becomes entitled as his next of kin to the exclusion of the reversioners to the fund or benefit of the charge (*d*).

Motive of appointment distinguished from purpose.

The mere motive of an appointment apart from the purpose to be effected by it, as the indulgence of feelings of preference or animosity towards the objects, is immaterial to the validity. "The court cannot inquire into the motive, but it can inquire into the intention or purpose" (*e*).

Appointment to child in consideration of benefit to parent.

If a parent, having a power of appointment amongst his children, execute it in consideration of some immediate benefit to be derived to himself from the appointment, as upon an agreement with the appointee for a payment or advance of money, the appointment is void as being in fraud of the power in regard to the other children; and as the appointee is a participator in the fraud and benefits by it, such appointment will be set aside *in toto*, and not merely to the extent of the sum (if any) diverted from the objects of the power (*f*). But a remote interest conferred upon the parent is not sufficient to invalidate an appointment by him in favour of a child, *de minimis non curat lex* (*g*). So too, a transaction in effect being a purchase at the full value by a parent of his child's interest in the subject-

(*b*) *Portland (Duke) v. Topham*, 11 H. L. C. 32; 34 L. J. C. 113; *Topham v. Portland (Duke)*, L. R. 5 Ch. 40; 39 L. J. C. 259. And see *Lee v. Fernie*, 1 Beav. 483, where the owner of the property had reserved the power to himself, and it was held that he was nevertheless bound by its terms.

(*c*) *Wellesley v. Mornington (Earl)*, 2 K. & J. 143.

(*d*) *Beere v. Huffmeister*, 23 Beav. 101; 26 L. J. C. 177; *Henty v. Wrey*, 21 Ch. D. 332. See *Roach v. Trood*, 3 Ch. D. 429.

(*e*) Sugden, Powers, 618; *Fane v. Dunganon (Lord)*, 2 Sch. & Lef. 130, 131, *per* Lord Redesdale; *Campbell v.*

*Home*, 1 Y. & C. C. C. 664. See the distinction between motive and purpose pointed out in *Topham v. Portland (Duke)*, 1 D. J. & S. 570; L. R. 5 Ch. 57.

(*f*) *Daubeny v. Cockburn*, 1 Mer. 626; *Farmer v. Martin*, 2 Sim. 502; *Arnold v. Hardwick*, 7 Sim. 343; *Re Perkins*, [1893] 1 Ch. 283; 62 L. J. Ch. 531; *Jackson v. Jackson*, Drury, 91. See *Palmer v. Wheeler*, 2 Ball & B. 18; *Hall v. Montague*, 8 L. J. O. S. C. 167.

(*g*) *Cooper v. Cooper*, L. R. 5 Ch. 203; 39 L. J. C. 240; *Roach v. Trood*, 3 Ch. D. 429. See *Bainbrigge v. Browne*, 18 Ch. D. 188; *Tucker v. Bennett*, 38 Ch. D. 1.



matter of the appointment may be supported (*h*). Trustees having notice that an appointment is invalid on the above-mentioned grounds, will pay over a trust fund at their peril; they are not, however, justified in refusing to hand over the fund upon mere circumstances of suspicion, a state of the law which sometimes places them in an unenviable position of difficulty (*i*).

Where the consideration for the preference of one of the children is given by another person, and not derived out of the property appointed, and though without the knowledge of the appointee, the appointment will be set aside; for it is a fraud upon the power in regard to the other objects who are thereby excluded from the property appointed (*k*).

Consideration paid by third party.

An appointment made upon any bargain or understanding that the appointee shall dispose of the property to persons who are not objects of the power is void and will be set aside (*l*).—An appointment made for the purpose and in the expectation that the appointee would transfer the property to a person, not an object of the power, was held void, though that purpose was not at the time communicated to the appointee (*m*).—But an appointment to a child upon marriage with a view to a suitable settlement being then made, though to include persons not objects of the power, is valid as being a proper mode of enjoyment of the property by the appointee (*n*).

Appointment for purpose of disposing to persons not objects.

An ulterior purpose may be consistent with the power;—as where the appointment is made to enable the appointee to join in making a title upon a sale of the property. Where a tenant for life with an exclusive power of appointment amongst his children sold the estate and then appointed to one son in fee, who joined with him in conveying to the purchaser, the title was held good, as it did not appear that the son got less than the value of his reversionary interest on acceding to the purchase (*o*).

Appointment for ulterior purpose consistent with power.

To enable appointee to join in sale.

(*h*) See *McQueen v. Farquhar*, 11 Ves. 467; *Noel v. Walsingham* (Lord), 2 Sim. & St. 99; *Askham v. Barker*, 17 Beav. 37. See *Saunders v. Shafte*, [1905] 1 Ch. 126; 74 L. J. C. 110.

(*i*) *Campbell v. Home*, 1 Y. & C. C. C. 664; *Cockcroft v. Sutcliffe*, 25 L. J. C. 313; *Mackenzie v. Marjoribanks*, 39 L. J. C. 604; *Harrison v. Randall*, 9 Hare, 397; 21 L. J. C. 294.

(*k*) *Rowley v. Rowley*, 1 Kay, 242; 23 L. J. C. 275.

(*l*) Sugden, Powers, 615; *Salmon v. Gibbs*, 3 De G. & Sm. 343; 18 L. J. C. 177; *Birley v. Birley*, 25 Beav. 308; 27 L. J. C. 569; *Pryor v. Pryor*, 2

De G. J. & S. 33; 33 L. J. C. 441; *Re Kirwan's Trusts*, 25 Ch. D. 373; 52 L. J. C. 952.

(*m*) *Re Marsden's Trust*, 4 Drew. 594; 28 L. J. C. 906.

(*n*) *Fitzroy v. Richmond (Duke)*, 27 Beav. 190; 28 L. J. C. 752; and see *ante*, p. 303.

(*o*) *McQueen v. Farquhar*, 11 Ves. 467; *Campbell v. Home*, 1 Y. & C. C. C. 664; as to questioning like transactions between father and son on the ground of undue influence and improper appropriation of the proceeds, see *Bainbrigge v. Browne*, 18 Ch. D. 188; 50 L. J. C. 522; *Tucker v. Bennett*, 38 Ch. D. 1;

Appointment  
for purpose of  
making a  
mortgage,

or lease,

or settlement.

So an appointment may be made by a tenant for life with power of appointing the remainder to his children, for the purpose of enabling the appointees to join him in a mortgage, the money being expressed to be advanced to all of them, and being applied in a business in which they were all partners (*p*); or for the purpose of making a building lease for the improvement of the property in the interest of all parties (*q*). An appointment may be made for the purpose of the appointee making a settlement on his or her marriage, though to include persons not objects of the power (*r*).

Execution  
partly in  
fraud of  
power.

The court cannot, in general, distinguish what is attributable to an authorised purpose from what is attributable to an unauthorised purpose, and the bad purpose affects the whole appointment; but if the evidence enable the court to make the distinction, the appointment will be void only *pro tanto* (*s*).

Appointment  
of jointure in  
excess of  
interest given  
to wife.

Where a power of jointuring was executed upon an agreement that part of the jointure should be applied to pay the debts of the husband, the appointment, as to that part, was set aside. Such an execution of the power, so far as it goes to the wife who is the sole object of the power, is good and may be supported; but so far as it diverts the property from her as the object of the power, it is in excess of the power and in fraud of the persons entitled in default of appointment (*t*). But a power to appoint a jointure is not a fiduciary power, and the donee may obtain a money payment, if it be not provided by diverting part of the jointure to his own use, in consideration of exercising it (*r*).

Appointment  
to one of  
children in  
fraud of  
power.

Under a power of appointment to children, an appointment made to one of them in fraud of the power will not invalidate an appointment made of the rest of the property to the other, unless the fraud runs through the whole transaction, in which case the appointment to the innocent party will also be invalid (*x*). And it seems that an appointment of a specific share to the same appointee to whom the invalid appointment is made, if unconnected with the invalidity, may be supported (*y*).

57 L. J. C. 507; *Powell v. Powell*, [1900] 1 Ch. 243; 69 L. J. C. 164.

(*p*) *Cockcroft v. Sutcliffe*, 25 L. J. C. 313.

(*q*) *Re Huish's Charity*, L. R. 10 Eq. 5; 39 L. J. C. 499.

(*r*) *Fitzroy v. Richmond (Duke)*, 27 Beav. 190; 28 L. J. C. 752. See *Pryor v. Pryor*, 2 De G. J. & S. 33; 33 L. J. C. 441.

(*s*) See *per* Turner, L. J., in *Topham v. Portland (Duke)*, 1 De G. J. & S. 517;

32 L. J. C. 270; and see *Re Perkins*, [1893] 1 Ch. 283; 62 L. J. C. 531.

(*t*) Sugden, Powers, 609; *Aleyn v. Belchier*, 1 Eden, 132; 2 Wh. & T. L. C. Eq. 308.

(*r*) *Saunders v. Shafto*, [1905] 1 Ch. 126; 74 L. J. C. 110.

(*x*) *Harrison v. Randall*, 9 Ha. 397; 21 L. J. C. 294; *Rowley v. Rowley*, Kay, 242; 23 L. J. C. 275; *Viant v. Cooper*, 76 L. T. 768.

(*y*) *Ranking v. Barnes*, 33 L. J. C. 539.

If a prior appointment be invalid, a subsequent appointment may be made of the same property under the original power; but it must be clearly shown to be free of the purpose or influence which has invalidated the prior appointment (z). And it is open to the objects of the power to confirm, and thus render valid an appointment made in fraud of the power (a).

Subsequent execution after prior invalid appointment.  
Confirmation.

A purchaser from the appointee under an appointment which may be set aside for the above causes, though he gave value and had no notice of the improper execution of the power, would have no better title in equity than the appointee himself (b).

Purchaser from appointee has no better title.

It was formerly necessary, in the case of a distributive or non-exclusive power to appoint a share to each of the objects of the power; but it was satisfied, at law, by giving some amount or interest, however small, to each object, either by way of direct appointment, or (which amounts to the same thing) by leaving residue unappointed to be divided amongst all the objects in default of appointment; but under similar powers, appointments whereby an unsubstantial, illusory or nominal share of the property was appointed to, or left unappointed to devolve upon any of the objects could be impeached in equity (c).

Illusory appointment under non-exclusive power valid at law.

But void in equity.

The statute 1 Will. IV. c. 46 (generally known as the Illusory Appointments Act) provides that appointments made after the passing of the Act "shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder or in default of appointment take more than an unsubstantial, illusory or nominal share of the property subjected to such power." The Act excludes from its operation appointments under powers which require a minimum sum to be appointed to each object (d). As was pointed out by a very eminent judge (e) "the reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get," and this suggestion was shortly afterwards embodied in the statute 37 & 38 Vict. c. 37,

Made valid in equity by statute.

Appointment not to be invalid on ground of exclusion.

(z) Sugden, Powers, 285, 355; *Humphrey v. Olcer*, 28 L. J. C. 406; *Curver v. Richards*, 1 De G. F. & J. 548; 29 L. J. C. 357; *Topham v. Portland (Duke)*, L. R. 5 Ch. 40; 39 L. J. C. 259.

(a) *Harrison v. Randall*, 9 Hare, 397; 21 L. J. C. 294; *Preston v. Preston*, 21 L. T. 346. See *Wade v. Cox*, 4 L. J. N. S. C. 105.

(b) *Daubeny v. Cockburn*, 1 Mer. 626. See *Green v. Pulsford*, 2 Beav. 70; *Hamilton v. Kirwan*, 2 Jo. & Lat. 393; *Warde v. Dixon*, 28 L. J. C. 315.

(c) Sugden, Powers, 449, App. 938.

(d) *Re Capon's Trusts*, 10 Ch. D. 484; 48 L. J. C. 355.

(e) Jessel, M. R., *Gainsford v. Dunn*, L. R. 17 Eq. 403; 43 L. J. C. 403.

commonly called Lord Selborne's Act, which applies to appointments thereafter made (*f*).

Execution by successive appointments.

Under the law applying to appointments made before the passing of this Act, where there are several appointments to different objects of the power at different times, and one is ultimately excluded, the ultimate appointment, disposing of the residue of the property, only is invalid; for to that appointment only the exclusive effect can be attributed (*g*).—But where several appointments are made to take effect at one time, as in the case of appointments by will with an ultimate residuary appointment, the exclusive effect is attributable to all equally and all are void (*h*).

## SECTION V. PERPETUITIES AND ACCUMULATIONS.

§ 1. The Rule against perpetuities.

§ 2. Accumulation of rents and profits.

### § 1. THE RULE AGAINST PERPETUITIES.

The Rules restricting the limitation of future estates—Rule against perpetuities—remainders—springing uses and executory devises—terms of years.

The computation of time—the lives—the term of twenty-one years—time of gestation, when child taking is *en ventre sa mère*—application to limitations of terms of years.

Limitations to persons to be ascertained by description.

Limitations to a class of persons—children—grandchildren—limitations upon death of children.

Limitations upon failure of issue—upon failure of issue within restricted period—of term of years upon failure of issue—construction of phrases importing failure of issue—exceptional constructions of limitations on failure of issue.

Validity of limitations is independent of subsequent events—limitation to class containing objects too remote—where the shares are ascertained within the period.

Limitations with modifications too remote—directions to postpone the possession beyond the period.

Limitation in alternative of limitation too remote—limitation in restricted alternative.

Limitations restricted by the duration of the estate limited—estate for life of living person—leasehold for life.

(*f*) See *Re Deakin*, [1894] 3 Ch. 565; 63 L. J. C. 779.

(*g*) *Young v. Waterpark (Lord)*, 13 Sim. 202; *affd.* 15 L. J. C. 63; *Trotlope v. Routledge*, 1 De G. & Sm. 662; *Wilson v. Kenrick*, 31 Ch. D. 658. It may be made good by the invalidity of a prior

appointment whereby the share thereby appointed passes to all the objects in default of appointment. *Ranking v. Barnes*, 33 L. J. C. 539.

(*h*) *Bulfeel v. Plummer*, L. R. 6 Ch. 160; 39 L. J. C. 805.

Limitations after estates tail—provisoes for cesser of estate tail—limitations to take effect after determination of estate tail—term preceding estate tail upon trusts subsequent.

Application of the rule to powers and execution of powers—the time is computed from the creation of the power—general power is equivalent to ownership.

Power to appoint to grandchildren or remoter issue—appointment must take effect within the rule—power in marriage settlement to appoint to children.

Powers of sale, leasing, etc. may be unrestricted in terms—power of sale with consent—power of sale extending over estates tail—powers impliedly restricted to the continuance of the settlement.

The limitation of future estates is subject to restrictions as to the time of taking effect, which differ according to the nature of the limitation, as operating by way of remainder, or by the way common to springing and shifting uses and executory devises. The principal restriction is the rule against perpetuities. This rule renders void the creation or limitation of a future estate which does not vest, if at all, in interest at a period not later than twenty-one years after the determination of some life or lives in being at the time when the deed or will becomes operative, and therein indicated as comprised in the computation of time. And where the person to take is actually procreated, there may be added a further period equal to the actual period of gestation (*a*). The rule against perpetuities was invented by the Chancellors (*b*), and the rule was first applied to legal contingent remainders by equity judges (*c*). Another equity judge applied the rule to a common law condition (*d*). It has been applied to remote equitable interests as, the equitable interest of a vendor of land and his representatives under an option not limited as to time to repurchase a part of the land sold (*e*), or of a lessee of land and his representatives to acquire the freehold reversion (*f*). The rule does not apply to covenants running with the land at law, as a covenant to renew a lease (*g*). If, however, the rule

The restrictions upon the limitation of future estates.—Rule against perpetuities.

(*a*) *Cudell v. Palmer*, 7 Bli. N. S. 202; Tud. L. C. Conv. 578; *Re Salaman*, [1908] 1 Ch. 4; 77 L. J. C. 60; Lewis, Perpetuities, c. xi.; Gray, Perpetuities, pp. 166—201.

(*b*) Jessel, M. R., *Re Ridley*, 11 Ch. D. 645, 649; 48 L. J. C. 563.

(*c*) Kay, J., *Re Frost*, 43 Ch. D. 246; 59 L. J. C. 485; Farwell, J., *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. C. 361; Buckley, J., *Whitby v. Von Luedecke*, [1906] 1 Ch. 783; 75 L. J. C. 359. It is not a little curious that the opinion of an eminent writer who in 1843 challenged the propriety of the conclusion of the Real Property Commissioners that the rule against perpetuities did not

apply to a legal remainder was not referred to in these cases. See Lewis, Perpetuities, pp. 408 *et seq*.

(*d*) *Re Hollis' Hospital (Trustees) and Haynes' Cont.*, [1899] 2 Ch. 540; 68 L. J. C. 673; where the previous conflicting views are discussed.

(*e*) *L. & S. W. Ry. v. Gomm*, 20 Ch. D. 562; 51 L. J. C. 530.

(*f*) *Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L. J. C. 555.

(*g*) *Bridges v. Hitchcock*, 5 Bro. P. C. 6; *Shelburne (Earl) v. Biddulph*, 6 Bro. P. C. 356; *Nicholson v. Smith*, 22 Ch. D. 640; 52 L. J. C. 191. See *L. & S. W. Ry. v. Gomm*, 20 Ch. D. 562; 51 L. J. C. 530; *Mackenzie v.*

against perpetuities is to be regarded as involving a question of policy, which is the view now put forward (*h*), there seems no reason why the rule should not be applied to these cases also.

Conveyancing  
Act, 1882.

A restriction upon the operation, but not on the validity, of executory limitations has been enacted with respect to those contained in an instrument coming into operation after 1882 in these terms: "where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable upon life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect" (*i*). An earlier statute had restricted the accumulation of rents and profits of land. The effect of this statute is stated hereafter (*k*).

Accumula-  
tion of rents  
and profits.

The restric-  
tions upon  
remainders.

The restrictions upon limitations by way of remainder have already been considered. They are, for the most part, involved in the dependence of the remainder upon the particular estate, requiring that it must become vested in interest pending that estate, so as to take effect in possession immediately upon its determination (*l*). The limitation of remainders is further restricted by the positive rule that, though they may be limited to the unborn child of a living person, they cannot be limited by way of purchase to the issue of a person unborn (*m*). In addition every person in whom the estate is to vest in interest must be ascertainable within the period prescribed by the rule against perpetuities, whether the remainder be equitable or legal, unless the remainder is to take effect after the determination of an estate tail, in which event it is saved by the statute *De donis* (*n*). But a limitation in remainder expectant upon the determination of an estate tail, may be destroyed by a tenant in tail in possession, when of full age, and by a tenant in tail in

*Childers*, 43 Ch. D. 265; 59 L. J. C. 188. And see *Leake*, *Contracts*, 858 *et seq.*

(*h*) See *Re Hollis' Hospital (Trustees) and Haynes' Cont.*, [1899] 2 Ch. 540; 68 L. J. C. 673; *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. C. 361.

(*i*) Conveyancing Act, 1882, s. 10. See *Re Booth*, [1900] 1 Ch. 768; 69 L. J. C. 474.

(*k*) *Post*, p. 335.

(*l*) *Fearne*, *Cont. Rem.* 307; *Archer's Case*, 1 Co. 66 b; *Chudleigh's Case*, 1

Co. 120 a; *White v. Summers*, [1908] 2 Ch. 256; 77 L. J. C. 506.

(*m*) *Re Frost*, 43 Ch. D. 246; 59 L. J. C. 118; *Whitby v. Mitchell*, 44 Ch. D. 85; 59 L. J. C. 485.

(*n*) *Heasman v. Pearse*, L. R. 7 Ch. 275; 41 L. J. C. 705; *Abbiss v. Burney*, 17 Ch. D. 211; 50 L. J. C. 348; *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. C. 361; *Whitby v. Von Lucdecke*, [1906] 1 Ch. 783; 75 L. J. C. 359. See *Tregonwell v. Sydenham*, 3 Dow. 194.

remainder with the consents mentioned in the Fines and Recoveries Act, 1833 (*o*), by means of a disentailing assurance, and he may thus acquire or convey an estate in fee simple discharged of all remainders expectant thereon. Therefore, the limitation in remainder after an estate tail remains effectual only during the minority of the tenant in tail; and if the estate tail be preceded by an estate or estates for life, as in an ordinary settlement of land, the limitations in remainder, though valid in creation, would not generally be operative beyond the lives of the tenants for life and twenty-one years, the possible minority of the tenant in tail.

On the other hand, limitations by way of springing use and executory devise arise and take effect according to the terms of limitation independently of the preceding estates, which they supersede and defeat; consequently there are no restrictions inherent in the nature of such limitations as there are in remainders. If limited after or in defeasance of an estate tail they may be discharged or destroyed by the disentailing assurance of the tenant in tail; but a tenant in fee simple cannot by any means destroy or get rid of the executory limitations of this kind which may operate upon his estate. Therefore, except where preceded by an estate tail, these limitations require a special rule of restriction; otherwise they might be employed in a manner to restrain the alienation of the land for an indefinite period or in *perpetuity* (*p*).

Restrictions upon springing uses and executory devises.

The rule against perpetuities applies to executory bequests of terms of years and chattel interests in lands (*q*); and also to the creation of future terms of years according to the opinion of eminent text writers, which in the present state of judicial opinion is likely to be confirmed (*r*). It may not be superfluous to observe that the rule does not affect the validity of the instrument in which limitations obnoxious to the rule occur, but only the limitations themselves. Accordingly the instrument must be read apart from the rules for the purpose of construction and the rule only applied to those limitations which

Terms of years.

(*o*) See *ante*, p. 27; *Allgood v. Blake*, L. R. 8 Ex. 160.

(*p*) See *ante*, p. 163; 1 Sanders, Uses, 149, 159, 201; Fearn, Cont. Rem. 423; Lewis, Perpetuities, *passim*; Gray, Perpetuities, *passim*.

(*q*) Hargrave's note (5) to Co. Lit. 20 *a*; Fearn, Ex. Dev. 460; *Massenburgh v. Ash*, 1 Vern. 234, 257, 304;

*Fletcher's Case*, 1 Eq. Cas. Ab. 193, pl. 10; *Curtis v. Lukin*, 5 Beav. 147; 11 L. J. C. 380.

(*r*) 1 Sanders, Uses, 206; Lewis, Perpetuities, 614. See *Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L. J. C. 555; *Re Ashforth*, [1905] 1 Ch. 535; 74 L. J. C. 361.

offend against it (s). And by a rule of universal application, where a limitation is susceptible of two meanings, that construction shall be favoured which will avoid the application of the rule (t).

Computation of time.

Where the limitations are contained in a deed, the time is computed from the date of the deed (u), and where the limitations are contained in a will, from the death of the testator (x).

The lives.

The lives of any persons, and of any number of persons, though wholly unconnected with the limitations in point of interest, may be taken for the measure of the period. Also a term of twenty-one years independent of any estate limited, or of the infancy of any person taking an estate or interest (y). If lives be not selected as part of the period restrictive of the limitation the rule imports that it must take effect within twenty-one years (z).

The term of twenty-one years.

Time of gestation, when child taking is *en ventre sa mère*.

As a child *en ventre sa mère* is considered as a person *in esse* for the purpose of taking property, the limits of the rule may be in fact extended by the time of the gestation of such child;—thus if a devise be made to the child of A. for life, such child being *en ventre sa mère* at the testator's death, the additional time of gestation may accrue at the commencement of the period allowed by the rule, which may be measured by the life of such child and twenty-one years;—so, if a devise be made to the children of A. who shall attain the age of twenty-one years, and

(s) *Heasman v. Pearse*, L. R. 7 Ch. 275; 41 L. J. C. 705; *Pearks v. Moseley*, 5 App. Cas. 714; 50 L. J. C. 57. Cp. the cases relating to contracts in restraint of trade where a similar rule is applied, *Mills v. Dunnham*, [1891] 1 Ch. 576; 60 L. J. C. 362; *Huynes v. Doman*, [1899] 2 Ch. 13; 68 L. J. C. 419.

(t) *Martelli v. Holloway*, L. R. 5 H. L. 532.

(u) *Lewis*, Perpetuities, 171; *Cooke v. Cooke*, 38 Ch. D. 202; *Whitby v. Von Luenecke*, [1906] 1 Ch. 783; 75 L. J. C. 359.

(v) *Cutlin v. Brown*, 11 Ha. 372; *Boughton v. Boughton*, 1 H. L. C. 406; *Storrs v. Benbow*, 3 De G. M. & G. 390; 22 L. J. C. 823. See *Re Game*, [1907] 1 Ch. 276; 76 L. J. C. 168.

(y) *Cadell v. Palmer*, 7 Bli. N. S. 202; Tnd. L. C. Conv. 578.

(z) *Palmer v. Holford*, 4 Russ. 403; *Speakman v. Speakman*, 8 Hare, 180; *Stuart v. Cockerell*, L. R. 5 Ch. 713; 39 L. J. C. 729; *Blight v. Hartnoll*, 19 Ch. D. 294; 51 L. J. C. 162. See *Re Bowles*, [1905] 1 Ch. 371; 74 L. J. C. 338. It may be here observed that the rule against perpetuities, though framed by analogy to the limits

of perpetuity possible with common law limitations by way of estates for life and remainders, leads to some different results. The latter mode of limitation is restricted, as to perpetuity, by the lives of the persons actually taking estates, and by the actual minority of the ultimate remainder-man; whereas the rule against perpetuities admits of an absolute period measured by lives and years, but wholly independent of the lives or minority of the persons actually interested; and in the case of the ultimate taker at the extreme limit of the period being a minor the disability to alienate might in fact be extended for a further period of twenty-one years. Again, the rule as to remainders prohibits absolutely the limitation of them to the issue of persons unborn; but the rule against perpetuities admits of executory limitations to the children or remoter issue of persons unborn, provided they are restricted to vest within the allowed period; and only when not so restricted such limitations are void. In the above respects, therefore, remainders are more restricted than other executory limitations. See 1 Jarman, Wills, 831.



A. die leaving a child *en ventre sa mère* the additional time of gestation may accrue at an intermediate period, and the limits of the rule may be extended until such child attains the age of twenty-one years;—so if the ultimate taker after a given period of lives in being and twenty-one years be a child *en ventre sa mère*, the limits of the rule may be in fact extended at the termination of the period by the time of gestation (a).

Examples of the application of the rule occur with limitations to a person to be ascertained by some description or character or qualification, which may not be satisfied within the allowed period (b). Thus, a devise to the first or other son of A. (having no son at the time of the devise,) who should be in holy orders, was held void for remoteness, because A. might have a son who might take orders so as to answer the description more than twenty-one years after the death of A.; and a devise over in the same will, in case A. should have no such son, was also held void, as being limited upon a contingency which might not become ascertained until an equally remote period (c).—So, a devise made to such person as should from time to time bear a certain title, in order that the property should be held with the title, was held void for remoteness, because the title might remain in abeyance for an indefinite period; and though that case did not happen, the validity of the limitation could not depend upon contingencies which might cause it to be good or bad according to the event (d).

Limitations to persons to be ascertained by description.

A devise to the first heir male of the body of A. who should attain twenty-one was held to be void for remoteness; because the person so described, not being necessarily A.'s son, who might die a minor leaving descendants who might answer the description (e).—A devise to the first son of A. who should attain twenty-one would obviously be good, though A. have no son at the time of the devise, as it must take effect, if at all, within twenty-one years of the death of A.

To heir attaining a certain age.

A bequest of personal estate made to the first tenant in tail under a settlement of real estate who should attain twenty-one, was construed to extend only to the tenants in tail taking by purchase under the settlement, and not to include tenants in

(a) *Cudell v. Palmer*, 7 Bli. N. S. 202; Tud. L. C. Conv. 578; *Long v. Blackall*, 7 T. R. 100; *Blackburn v. Stables*, 2 V. & B. 367; *Re Salaman*, [1908] 1 Ch. 4; 77 L. J. C. 60.

(b) *Lewis on Perpetuities*, c. xviii.; *Re Bowles*, [1905] 1 Ch. 371; 74 L. J. C. 338; *Re Ashforth*, [1905] 1 Ch. 535;

74 L. J. C. 361.

(c) *Proctor v. Bath and Wells (Bp.)*, 2 H. Bl. 358.

(d) *Tollemache v. Coventry (Earl)*, 5 Madd. 232; 8 Bligh, N. S. 547.

(e) *Dungannon (Lord) v. Smith*, 12 Cl. & F. 546.

tail by descent, and therefore being within the allowed period of limitation was good (*f*).

Limitations to  
class of per-  
sons as  
children.

Limitations to a described class of persons, as children, issue and the like, must be so restricted that the objects of the class become ascertained within the time allowed by the rule. Thus, an executory devise to all the children of A. who shall attain the age of twenty-one, though it include children born after the testator's death, is good; because it must necessarily be ascertained within the life of the parent and twenty-one years. But if it were to such children of A. as should attain the age of twenty-two, or any greater age than twenty-one, and included after-born children, it would be void for remoteness, as possibly not to be ascertained within such limit of time (*g*). So, a devise to the children of A. who should be living at the end of twenty-eight years from the death of the testator was held void, because the time for ascertaining the objects was too remote; and a gift over in case there should be no such child was also held to be too remote (*h*).

To grand-  
children.

A devise or bequest may include all the testator's grandchildren, born and to be born, without infringing the rule, as they must all be born within lives in being at the testator's death; and the vesting of their shares may be further postponed during their minorities, but not beyond. On the other hand, a devise or bequest including all the grandchildren, born and to be born, of any other person is too remote, because children might be born to that person after the testator's death, and grandchildren might be born at any time during the lives of those children (*i*).

It may be observed that limitations to a class, as to the children of A. who shall attain the age of twenty-two, or to the children and grandchildren of A., may be good, if limited by way of remainder though void by way of executory devise, as being too remote. For either the words of contingency would be treated as descriptive of a condition subsequent upon which the gift would become divested (*k*), a construction inapplicable to

(*f*) *Christie v. Gosling*, L. R. 1 H. L. 279; 35 L. J. C. 667; *Re Cresswell*, 24 Ch. D. 102; 52 L. J. C. 798. See *Harrington v. Harrington*, L. R. 5 H. L. 87; 40 L. J. C. 716; *Re Dayrell*, [1904] 2 Ch. 496; 73 L. J. C. 795.

(*g*) *Stephens v. Stephens*, Cas. t. Talb. 228; *Leake v. Robinson*, 2 Mer. 363; *Edmondson's Estate*, L. R. 5 Eq. 389; *Smith v. Smith*, L. R. 5 Ch. 342. As to the construction of devises to children,

see *ante*, p. 267.

(*h*) *Palmer v. Holford*, 4 Russ. 403. See *Speakman v. Speakman*, 8 Ha. 180.

(*i*) *Newman v. Newman*, 10 Sim. 51; *Smith v. Smith*, L. R. 5 Ch. 342; *Stuart v. Cockerell*, L. R. 5 Ch. 713; 39 L. J. C. 729; *Re Mercin*, [1891] 3 Ch. 197; 60 L. J. C. 671.

(*k*) *Boraston's Case*, 3 Co. 19; Tud. L. C. Conv. 427; *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313; *affd.* by H. L.,

personal estate (*l*) ; or, by the rules regulating remainders the gift would be restricted to such objects of the class as would be ascertained at the determination of the particular estate (*m*).

A devise limited to take effect in the case of all the children of a living person dying under the age of twenty-one is good ; but if postponed until their death at any time, or at any age greater than twenty-one, it is too remote (*n*).—A devise over in case of all the children of a person dying under a certain age may, in some cases, be construed to include the contingency of there being no children, so as to take effect either if the person has no children, or if, having children, they do not attain the given age, and the limitation as regards the former contingency may be supported separately, though the limitation as regards the latter contingency be void (*o*).

Limitation upon death of children.

Future uses and executory devises limited to take effect upon failure of the issue of A. indefinitely, are obviously too remote (*p*).—But a remainder expectant upon the determination of an estate tail is valid, therefore a limitation to A. for an estate in tail general, followed by a limitation over upon failure of the issue of A. is good (*q*). Also, if there be a preceding limitation to A. and his heirs, with a limitation over on failure of issue of A. indefinitely, the estate of A. is restricted to a fee tail, and the limitation over is a remainder, by a well-known rule of construction (*r*). And by a further rule of construction applicable to wills, a devise in terms to A. for life, with a devise over upon failure of issue of A. indefinitely, gives A. an estate tail with remainder over (*s*).

Limitation upon failure of issue.

If a devise in fee be followed by an executory devise upon the failure of heirs to a stranger, it is too remote ; but when the gift over is limited to one who is capable of becoming a collateral heir of such person, the word heirs in the first devise is con-

Limitation upon failure of heirs.

Lds. Jols. 1811, fos. 468, 471 ; *Doe v. Nowell*, 1 M. & S. 327 ; *Rindoll v. Doe*, 5 Dow. 202.

(*l*) *Pearkes v. Moseley*, 5 App. Cas. 714 ; 50 L. J. C. 57.

(*m*) *Sussex (Earl) v. Temple*, 1 Ld. Raym. 311 ; *Oates v. Jackson*, 2 Stra. 1172 ; *Doe v. Perryn*, 3 T. R. 484 ; *Doe v. Martin*, 4 T. R. 39 ; *Mogg v. Mogg*, 1 Mer. 654.

(*n*) *Proctor v. Bath and Wells (Bp.)*, 2 H. Bl. 358 ; *Edmondson's Estate*, L. R. 5 Eq. 389. See *Re Sayer's Trusts*, L. R. 6 Eq. 319 ; 36 L. J. C. 350.

(*o*) See *ante*, p. 266 ; *Mackinnon v. Sewell*, 2 M. & K. 202 ; *Wilson v. Mount*,

2 Beav. 397 ; *Ecers v. Challis*, 7 H. L. C. 531. See *Brookman v. Smith*, L. R. 7 Ex. 271 ; 41 L. J. Ex. 114 ; *Monypenny v. Dering*, 2 De G. M. & G. 145 ; 22 L. J. C. 313.

(*p*) *Fearne*, Ex. Dev. 444. See *Forth v. Chapman*, 1 P. Wms. 663 ; Tud. L. C. Conv. 371.

(*q*) *Heasman v. Pearse*, L. R. 7 Ch. 275. See *Doe v. Elvey*, 4 East, 579.

(*r*) *Fitzgerald v. Leslie*, 3 Bro. P. C. 154 ; *Dansey v. Dansey*, 4 M. & S. 61.

(*s*) *Sanday's Case*, 9 Co. 127 b ; *Machell v. Weeding*, 8 Sim. 4 ; *Doe v. Owens*, 1 B. & Ad. 318.

strued as heirs of the body, reducing the devise to an estate tail, and the devise over operates by way of remainder (*t*).

Limitations upon failure of issue within a restricted time.

A future use or executory devise limited to take effect upon failure of issue of A. restricted within a definite period not too remote may be good:—as a limitation to take effect upon the death of A. without issue living at his death;—or upon the death and failure of issue of A. in the lifetime of B.;—for such limitations must take effect, if at all, upon the death of A. or before the death of B.—So, a limitation to take effect, if A. die leaving issue at his death, and such issue die under the age of twenty-one years, is within the limits of the rule (*u*).—Such limitations over upon restricted failure of issue have no implied effect, like limitations over upon indefinite failure of issue, in enlarging or restricting the preceding limitation to an estate tail, because they correspond to the determination of an estate tail only in a particular event; but if they follow a limitation in tail, they take effect by way of remainder, contingent upon the failure of issue at the death of A. or other event specified, by which the estate tail is determined (*x*).

Limitation of term of years upon failure of issue.

An executory bequest of a term of years limited to take effect upon failure of issue, unless restricted within the period allowed by the rule, is too remote; for words which would create an estate tail in freehold lands, confer an absolute interest in a term of years. And such a limitation cannot in any case be supported as a remainder, (like a limitation upon failure of issue after an estate tail,) because a term of years, as personalty, is not capable of such mode of limitation, all future limitations of such property being essentially executory (*y*).

Construction of phrases importing failure of issue.

In the construction of deeds limiting estates in land, the words *die without issue*, *without having issue*, *without leaving issue*, *for want* or *in default* or *on failure of issue*, and other like expressions presumptively import the failure of issue indefinitely or at any period (*z*). The same construction prevails in wills made before the year 1838, and, in general, whether of real or personal estate; except that the phrase *die without leaving issue*, applied to personal estate is construed to mean a failure of issue at the death. But in the case of wills made after 1837, words importing

(*t*) *Nottingham v. Jennings*, 1 P. Wms. 23; *Re Waugh*, [1903] 1 Ch. 744; 72 L. J. C. 586.

(*u*) *Fearne*, Ex. Dev. 468, 470; *Pells v. Brown*, Cro. Jac. 590; *Duke of Norfolk's Case*, 3 Ch. Ca. 1; 2 Freem. 80; *Porter v. Bradley*, 3 T. R. 143; *Doe v. Webber*, 1 B. & Ald. 713. See

*Staines v. Maddock*, 3 Bro. P. C. 108.

(*x*) See *ante*, pp. 138, 263.

(*y*) *Fearne*, Ex. Dev. 460, 478; *Warter v. Warter*, 2 Brod. & B. 349; 1 B. & C. 721; *Christie v. Gosling*, L. R. 1 H. L. 279; 35 L. J. C. 667.

(*z*) *Morgan v. Morgan*, L. R. 10 Eq. 99; 39 L. J. C. 493.

a general failure of issue are presumptively restricted to a failure of issue of a named person at his death (*a*).

Some exceptional cases occur in the construction of devises over upon failure of issue.—Where a devise upon failure of issue follows a devise to children, sons, or other particular branch or class of issue, it may refer only to the objects of the prior limitation, and so be restricted to the failure of *such* issue. These cases are expressly excepted from the statutory construction put upon words expressing failure of issue by the 1 Vict. c. 26, s. 29 (*b*).

Exceptional cases of construction,—devise on failure of issue, following devise to issue.

Where a testator, having no issue at the time of making his will, makes a devise upon failure of issue of himself, he is considered to refer only to a failure of issue at his death and not to an indefinite failure of issue (*c*).

Devise on failure of testator's own issue.

If a testator, being entitled to a remainder or reversion expectant upon an estate tail, devise it upon failure of the issue in tail, the devise is not executory but immediate, the limitation upon failure of issue being merely descriptive of the reversionary interest.—If the reversion or remainder be expectant upon an estate in tail male or other estates tail not comprehending all the issue, a devise of such reversion or remainder upon a general failure of issue of the tenant in tail is, according to the literal construction, executory, and, if not further restricted within the period allowed by the rule, is void (*d*). But where land is settled for estates tail not comprehending all the issue, a limitation over upon failure of issue in the same instrument, whether a deed or a will, or in a subsequent instrument or appointment referring to the former limitations, will generally be read as meaning the failure of issue under the entail and as applying to the reversion or remainder expectant upon the estates tail, unless a contrary intention appear (*e*).

Devise of reversion of estate tail on failure of issue in tail.

The rule of construction in wills may be here noticed, that where a devise is made to A. in fee simple, with a devise over “if A. die under 21 *or* without issue,” the word “*or*” may be read “*and*,” and the failure of issue thereby restricted to the death of

Devise over on death under 21 *or* without issue, *or* read as *and*.

(*a*) See *ante*, p. 139, where sect. 29 of the Wills Act, 1837, by which the change was effected, is set out; 2 Jarman, Wills, 1324 *et seq.*

(*b*) See the section and proviso, *ante*, p. 139. See the rules for applying this referential construction discussed at length in 2 Jarman, Wills, 1285 *et seq.*

(*c*) 2 Jarman, Wills, 1326; the birth of a child does not revoke a will, and therefore is a contingency which a

married testator may be presumed to contemplate and provide against. A will is revoked by marriage, 1 Vict. c. 26, s. 18.

(*d*) *Lanesborough (Lady) v. Fox*, Cas. t. Talb. 262; *Banks v. Holme*, 1 Russ. 394 n.; *Egerton v. Jones*, 3 Sim. 409; 2 Jarman, Wills, 1314 *et seq.*; *Fearne*, C. R. 448.

(*e*) *Eno v. Eno*, 6 Hare, 171. See *Ellicombe v. Gompertz*, 3 M. & Cr. 127.

A. under twenty-one; this construction is adopted to support the presumed intention not to exclude the issue, if A. diē under twenty-one leaving issue, which result would follow upon the literal construction (*f*).—So, where A. was heir at law of the testator and took the fee by descent, and there was a devise over in the above terms (*g*).—But this rule is not applied after an estate tail, because the devise over on failure of issue may then take effect as a remainder (*h*).

Validity of limitation is independent of subsequent events.

The validity of a limitation as to remoteness is determined at the time of its creation,—at the date of the deed, if by deed,—or at the death of the testator, if by will;—and if it may then possibly exceed the limits allowed by the rule, it is void, without regard to the subsequent course of events which may, in fact, sufficiently restrict its operation (*i*).

According to this principle of applying the rule, a gift to the children of A. who should be living at a period too remote is held to be void, notwithstanding the moral certainty, from the age of the parents, that no children could be born after the death of the testator (*j*). So a gift over upon an event which is too remote, as upon the death of all the children of A., a person so advanced in years as to be unlikely to have children, is void (*k*).

Limitation to class containing objects too remote.

A limitation to a class of persons, some of whom may not be ascertained within the limits of time, is not rendered valid by the fact that some of the objects of the class are already ascertained, or that some or all objects of the class become eventually ascertained within the period allowed; because the impossibility of ascertaining the number of shares within the proper period involves the whole gift in uncertainty. Thus, where a bequest was made to A. for life and after his decease to the child or children of A. who should attain the age of twenty-five, as the class must be ascertained at the death of A., it was held that the bequest was wholly void, without any exception in favour of children living at the death of the testator (*l*). But where the

(*f*) *Right v. Day*, 16 East, 69; *Fairfield v. Morgan*, 2 Bos. & P. N. R. 38; *Greg v. Pearson*, 6 H. L. C. 61; 26 L. J. C. 472.

(*g*) *Johnson v. Simcock*, 7 H. & N. 314; 31 L. J. Ex. 38.

(*h*) *Mortimer v. Hartley*, 6 Ex. 47; S. C. 3 De G. & Sm. 316.

(*i*) *Jee v. Audley*, 1 Cox, 324; *Dunneen (Lord) v. Smith*, 12 Cl. & F. 546; *Boughton v. Boughton*, 1 H. L. C. 406; *Re Dawson*, 39 Ch. D. 155; *Re Wood*, [1894] 3 Ch. 381; *Re Ashforth*, [1905] 1 Ch. 535; *Haycock v. Watson*, [1902]

A. C. 14; 71 L. J. C. 149.

(*j*) *Jee v. Audley*, 1 Cox, 324; *Re Dawson*, 39 Ch. D. 155; 57 L. J. C. 105.

(*k*) *Sayer's Trusts*, L. R. 6 Eq. 319; 36 L. J. C. 360; *Hancock v. Watson*, [1902] A. C. 14; 71 L. J. C. 149.

(*l*) *Leake v. Robinson*, 2 Mer. 363; *Smith v. Smith*, L. R. 5 Ch. 342; *Bentinck v. Portland (Duke)*, 7 Ch. D. 693; 47 L. J. C. 235; *Pearks v. Moseley*, 5 App. Cas. 714; 50 L. J. C. 57. See *Mogg v. Mogg*, 1 Mer. 654.

gift to a class is not preceded by a life estate, the class is to be ascertained at the death of the testator, and an original executory gift to the children of A. who shall live to attain twenty-five years is a valid gift to such of the children living at the death of the testator who shall attain twenty-five (*m*).

But where, upon a gift to a class of persons, the number of shares must become ascertained within the period, and the destination of some of the shares only is too remote, the limitation as to the rest may be valid.—Thus, a testator devised to A. for life, with remainder to the children of A. in equal shares for life, with remainder, as to the share of each child, to the children of that child in fee; the devise was held good, except only as to the remainders in the shares of the children of A. born after the testator's death, the number of shares being finally ascertained at the death of A. (*n*).

May be valid as to shares ascertained within the period.

Thus also, a gift after a life estate to A., to his children who should attain twenty-one, and the issue of such of them as should die under twenty-one, such issue to take only the share of their parents, but conditionally upon their attaining twenty-one, was held good as to the shares of the children who attained twenty-one, because the number of shares must be ascertained within twenty-one years of the death of A., though void as to the shares of those dying under twenty-one, because the vesting of such shares was postponed until the issue (of children who might not be born until after the testator's death) attained twenty-one (*o*).

Where a future interest is limited to vest within the prescribed limits of time, but is attended with a clause settling or modifying the interest in a manner extending beyond the limits, and which is therefore void, the substantive limitation may stand unaffected by the subsequent clause. Thus, if there be a gift to one for life, and after his death to such of his children as attain twenty-one, with a direction to settle the children's shares, the direction will be valid as to those who are born in the testator's lifetime, but invalid as to those born afterwards (*p*). And a residuary gift absolute in terms will not be displaced by a direction to settle the share of a female upon her for life and

Limitations with modifications too remote.

(*m*) *Picken v. Matthews*, 10 Ch. D. 264; 48 L. J. C. 150.

(*n*) *Cutlin v. Brown*, 11 Hare, 372.

(*o*) *Moseley's Trusts*, L. R. 11 Eq. 499; 40 L. J. C. 275; and see the same principle applied in *Storrs v. Benbow*, 3 D. M. & G. 390; 22 L. J. C. 823;

*Wilson v. Wilson*, 28 L. J. C. 95. See, however, *Pearks v. Moseley*, 5 App. Cas. 714; 50 L. J. C. 57.

(*p*) *Re Russell*, [1895] 2 Ch. 698; 64 L. J. C. 891; *Itc Game*, [1907] 1 Ch. 276; 76 L. J. C. 168.

after her decease upon such of her children who should attain the age of twenty-five (*q*).

Directions to postpone possession only beyond the period.

If a future interest be limited to vest within the period allowed, with a direction to postpone the possession beyond that period, the direction as to the possession may be rejected and the limitation may be good. Thus, devises to all the children of A. *when* and *as* they attain, or *at*, or *upon* their attaining, some given age, have been construed as giving vested interests in the children as they come into existence, but with a postponement of the possession or distribution; which, if extended to postponing the possession of unborn children beyond the age of twenty-one is void (*r*).—With vested interests, not being remainders, the possession cannot be effectually postponed, unless there be a divesting limitation to take effect within the period of postponement, for a person of full age taking a presently vested and indefeasible interest in the property is not bound to let the income accumulate, which he himself will be ultimately entitled to; he may dispose of his whole interest as soon as he is competent to do so (*s*).

Limitation in alternative of event beyond the rule.

A limitation by way of remainder after a limitation too remote, being limited to take effect in the alternative of the same event, is also too remote; and it is not accelerated by the prior limitation being void, or by the alternative of the event in fact happening within the prescribed period. As a devise to the children of A. who should be living at the end of twenty-eight years from the death of the testator, with devises over in case there should be no such child; the devise to the children is void as possibly not ascertained until a period too remote, and the gifts over not being to take effect until after the same period, which is too remote, are necessarily void also (*t*).

Limitation in restricted alternative.

But a limitation in an alternative to a too remote event, if restricted to happen within the allowed limits, may be good (*u*)

(*q*) *Ring v. Hardwick*, 2 Beav. 352; *Hancock v. Watson*, [1902] A. C. 14; 71 L. J. C. 149.

(*r*) *Farmer v. Francis*, 2 Bing. 151; 2 Sim. & St. 505; *Murray v. Addenbrooke*, 4 Russ. 407; *Judd v. Judd*, 3 Sim. 525; *Doe v. Ward*, 9 A. & E. 582. See *Re Francis*, [1905] 2 Ch. 295; 74 L. J. C. 487. As to the reference of such expressions to a limitation over, see *ante*, p. 265.

(*s*) *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vantier*, 1 Cr. & Ph. 240; 4 Beav. 115; *Re Travis*, [1900] 2 Ch. 541; 69 L. J. C. 663. See *Wharton v.*

*Masterman*, [1895] A. C. 186; 64 L. J. C. 369.

(*t*) *Palmer v. Holford*, 4 Russ. 403; see 1 Jarman, Wills, 230, *n. (e)*, 3rd edn.; *Proctor v. Bath and Wells (Bp.)*, 2 H. Bl. 358; *Robinson v. Harbridge*, 2 T. R. 241; 2 Bro. C. C. 22; *Routledge v. Dorril*, 2 Ves. 357; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 302; *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25. See *Hancock v. Watson*, [1902] A. C. 14; 71 L. J. C. 149.

(*u*) *Doe v. Ford*, 2 Ell. & B. 970; 23 L. J. Q. B. 53; *Re Bowles*, [1905] 1 Ch. 371; 74 L. J. C. 338.



—As if a devise be made to the children of A. who should attain the age of twenty-five, and in case A. should die without leaving issue at his death, or leaving issue they should all die before the age of twenty-five, then to B.; the devise in the event of A. dying without leaving issue would be good, and that in the event of A. leaving issue would be bad (*x*)—A limitation over in the event of the death of all the children of A. under a certain age, which if exceeding twenty-one years would render the limitation void for remoteness, may be construed in some cases to extend to the event of there being no children, as a separate alternative event, and in such event the limitation would be good (*y*).

A limitation in terms too remote may be restricted in effect by the duration of the estate limited, which may be such as must determine within the period allowed, as an estate for the life of a living person. Thus an executory devise, after the failure of issue of A., to B. for life is good, because the estate must necessarily take effect, if at all, during the life of B., and the rule, as to the time of limitation, is excluded (*z*).

Limitations restricted by duration of the estate limited.

But this exclusion of the rule extends no further than the life estates created in living persons; and the rule applies as to other limitations for transmissible interests to take effect upon the failure of issue, though created at the same time and in the same instrument. Thus, a testator (before 1838) devised all his estate, upon failure of issue of A. to be divided between certain persons named, but the part of one for life only; it was held that though the devise for life to the one was good, and would take effect if that one should be living when the issue failed, yet the devise of absolute transmissible interests to the others, to take effect upon the indefinite failure of issue, was void for remoteness (*a*).

A future limitation may purport to be made to a person to take effect upon an indefinite failure of issue or any other remote period, for any estate, if made contingently upon his

Limitation contingent on person being alive.

(*x*) *Cambridge v. Rous*, 8 Ves. 12; *Leake v. Robinson*, 2 Mer. 363.

22 L. J. C. 345. And see *ante*, pp. 138, 324.

(*y*) *Meadows v. Parry*, 1 Ves. & B. 124; *Mackinnon v. Sewell*, 5 Sim. 78; 2 M. & K. 202. See *Evers v. Challis*, 7 H. L. C. 531; 29 L. J. Q. B. 121; *Re Bence*, [1891] 3 Ch. 242; 60 L. J. C. 636.

(*a*) *Ward v. Beril*, 1 Y. & J. 512; *Barlow v. Salter*, 17 Ves. 479. See *Fisher v. Webster*, L. R. 14 Eq. 283; 42 L. J. C. 156. The above doctrine can have little application to wills coming under the operation of 1 Vict. c. 26, s. 29, which restricts the failure of issue to meaning failure at death unless a contrary intention appear. See *ante*, p. 139.

(*z*) *Roe v. Jeffery*, 7 T. R. 589, as expld. *Doe v. Ewart*, 7 A. & E. 636, 660; 7 L. J. Q. B. 177; *Fearne*, Ex. Dev. 488. See *Re Ryce's Settlement*, 10 Hare, 106;

being then alive; for then it would be expressly restricted within the limits allowed (*b*).

Leaseholds  
for lives or  
terms of  
twenty-one  
years.

The same doctrine applies to future limitations of leaseholds for lives, or for terms of years determinable with lives, or for an absolute unexpired term of years not exceeding twenty-one; these are not subject to the rule against perpetuities, because the limits of duration of the estate sufficiently restrict the vesting within the allowed period (*c*). Thus, where a term was created of one hundred and twenty years, if twenty-eight persons named or the survivor of them should so long live, with an additional term of twenty years from the expiration of that term, and was made the subject of a settlement, the limitations of the settlement, though in terms void for remoteness, were allowed to be good because restricted in effect by the subject to which they were applied (*d*);—but the above doctrine seems not to be applicable to renewable leaseholds, for such estates are equivalent to indefinitely continuing interests (*e*).

Renewable  
leasehold.

Rule not  
applied to  
limitations  
after estates  
tail.

The rule against perpetuities is not applied to executory limitations, whether by way of shifting use or executory devise, which are to take effect in defeasance or upon the determination of an estate tail; because the power of disposition of the tenant in tail for the time being, by means of a disentailing assurance, extends over all subsequent limitations of whatever kind and enables him to acquire or convey the fee simple, and the freedom of alienation is thereby preserved (*f*).

Provisoers for  
cesser of  
estate tail.

Estates tail may, therefore, be settled subject to conditional limitations or provisoers for cesser, with limitations over, indefinite as to time, as a proviso divesting the estate in the event of the tenant in tail or any issue in tail neglecting to assume the name and arms of the settlor,—or in the event of their becoming entitled to other settled estates;—for such limitations or provisoers may be barred by the disentailing assurance of the tenant in tail (*g*).—Whereas such limitations over in defeasance of an estate in fee simple, as they could not be barred by the tenant, would be void, unless expressly

(*b*) *Pells v. Brown*, Cro. Jac. 590; *Porter v. Bradley*, 3 T. R. 143; *Doe v. Webber*, 1 B. & Ald. 713. See *Staines v. Maddock*, 3 Bro. P. C. 108.

(*c*) Butler's note (*e*) to *Fearne*, C. R. 500; *Low v. Barron*, 3 P. Wms. 262; *Wastneys v. Chappel*, 1 Bro. P. C. 457.

(*d*) *Cadell v. Palmer*, 7 Bligh, N. S. 202; *Tud. L. C. Conv.* 578.

(*e*) *Bridges v. Hitchcock*, 5 Bro. P. C.

6; *Shelburne (Earl) v. Biddulph*, 6 Bro. P. C. 356. See *ante*, pp. 155, 317.

(*f*) *Lewis*, *Perpetuities*, c. xxxii.; *Sanders*, *Uses*, 201; *Fearne*, *Ex. Dev.* 423.

(*g*) *Nicolls v. Sheffield*, 2 Bro. C. C. 215; *Curr v. Erroll (Earl)*, 6 East, 58; *Scarborough (Earl) v. Doe*, 3 A. & E. 897. See *Gulliver v. Ashby*, 4 Burr. 1927.

restricted to operate within the period allowed by the rule against perpetuities (*h*).

Accordingly, where a devise was made for estates tail, with remainder to trustees upon trust to sell and to divide the proceeds amongst the children of A. who should be then living and the issue of such of them as should be then dead, with a proviso that if any of such issue should be then dead leaving issue, the issue should take the share of the parent, the proviso, though operating throughout the continuance of the estates tail, was held valid; and it was laid down by the court "that whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell and to divide the produce amongst such class, is wholly immaterial, if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail" (*i*).

Limitations operating during or at determination of estate tail.

An executory limitation after an estate tail, which may not be ascertained at the determination of the estate tail (not being a contingent remainder, which must take effect then or not at all), though it may be barred by the tenant in tail during his tenancy, may be incapable of being barred by the remainder-man after the determination of the estate tail, and in this view may be considered to be subject to the rule against perpetuities; but there does not appear to be any direct authority upon the point.

Limitations operating after determination of estate tail.

Thus, if land be limited to A. in tail male with remainder to B. in fee, subject to an executory limitation to take effect upon the general failure of issue of A., such executory limitation would seem not to be withdrawn from the rule by reason of the prior estate tail, since it might be neither barred nor ascertained during the continuance of the estate tail, and after the determination of that estate, it could not be barred by the tenant in fee, and would be open to all the objections the rule is intended to meet (*k*).

If a term of years be created antecedent to an estate tail, it cannot, nor can any trusts of the term be barred by the tenant in tail. The trusts of such term are therefore subject to the rule against perpetuities and must be limited to take effect within the period allowed by the rule. Thus, where a term was

Term preceding estate tail upon trusts subsequent.

(*h*) See *ante*, p. 319.

(*i*) *Heasman v. Pearce*, L. R. 7 Ch. 275; 41 L. J. C. 705; *Morse v. Ormonde* (Lord), 5 Madd. 99; 1 Russ. 382.

(*k*) See *Lewis, Perpetuities*, 671;

*Hartopp v. Lord Curbery*, cited in 1 Sanders, Uses, 204. See *Bristow v. Boothby*, 2 Sim. & St. 465; *Morse v. Ormonde* (Lord), 5 Madd. 99; 1 Russ. 382; *Faulkner v. Daniel*, 3 Ha. 199.

created prior to estates tail upon trusts to raise portions upon failure of issue in tail, the trusts were held void for remoteness (*l*).

Application  
of the rule to  
powers, and  
execution of  
powers.

The rule against perpetuities applies to powers, but with the modifications required by the nature of a power. A power may be unrestricted in its terms as to the limits within which appointment is authorised; because the power alone gives no estate, but only the authority to appoint estates and interests. But the appointment under a power must be restricted to estates and interests which shall take effect within the time allowed by the rule (*m*). But where the object of a power, as appearing in its terms, is to create a perpetuity, or it can only be exercised at a period outside the limits of the rule, it is void (*n*). And the validity of limitations in a deed creating the power to take effect in default of appointment under a power which is void for remoteness, depends upon whether they are or are not themselves obnoxious to the rule (*o*).

Time is com-  
puted from  
creation of the  
power.

The uses and estates appointed take effect from the instrument creating the power, as if originally inserted therein in place of the power. Therefore the time allowed by the rule is, in general, computed from the creation of the power and not from the appointment; that is, from the execution of the deed, if the power be created by deed, and from the death of the testator, if by will (*p*).

Under general  
power time is  
computed  
from the  
appointment.

But a general power is equivalent, as regards the disposal of the property, to the absolute ownership; and the execution of such a power is considered, in substance, as an original disposition. Therefore, the time within which the limitations appointed under it must take effect is to be computed from the execution of the power and not from the creation of it (*q*).—Thus, if A. were to convey his estate to such uses generally as he should appoint, he might afterwards, upon the birth of a son, make a valid appointment of the estate to that son for life, remainder to his sons as purchasers; although a conveyance by A. to an unborn son for life, followed by a limitation in

(*l*) *Eales v. Conn*, 4 Sim. 65; *Case v. Drasier*, 2 Keen, 764; 5 M. & Cr. 246; *Sykes v. Sykes*, L. R. 13 Eq. 56; 41 L. J. C. 25.

(*m*) Sugden, Powers, 31, 151; *Griffith v. Pownall*, 13 Sim. 393; *Slark v. Dakyns*, L. R. 10 Ch. 35; 44 L. J. C. 205; *Hodgson v. Hatford*, 11 Ch. D. 959; 48 L. J. C. 548; *Wainwright v. Miller*, [1897] 2 Ch. 255; 66 L. J. C. 616; *Re Gage*, [1898] 1 Ch. 498; 67 L. J. C. 200.

(*n*) *Spencer v. Marlborough (Duke)*,

3 Bro. P. C. 232; *Ferrand v. Wilson*, 4 Ha. 344; 15 L. J. C. 41; *Floyer v. Bankes*, L. R. 8 Eq. 115; *Goodier v. Edmunds*, [1893] 3 Ch. 455; 62 L. J. C. 619.

(*o*) *Re Abbott*, [1893] 1 Ch. 54; 62 L. J. C. 46.

(*p*) Sugden, Powers, 396, 470; Lewis, Perpetuities, c. xx.

(*q*) Sugden, Powers, 396, 470; *Ross v. Jackson*, 29 Ch. D. 521; 54 L. J. C. 732; *Re Flower*, 55 L. J. C. 200.

remainder to the sons of that son as purchasers would be invalid (*r*).

According to these principles, a power may be well created to appoint to grandchildren or other more remote issue of a person, without any express restriction to those who may be born within the time allowed from the creation of the power; but the appointment authorised is impliedly so restricted, and the power, so far as it extends to more remote objects, is simply void.—An appointment to any objects of such power living at the time of the appointment would be valid; also an appointment restricted to those objects, whether grandchildren or remoter issue, who may be born in the lifetime of the donee of the power, or within twenty-one years of his death, would be valid; because such appointments must take effect within the limits of time allowed from the creation of the power (*s*).—But an appointment to the grandchildren or remoter issue, without restriction as to the time of their birth, would be void altogether, even as to those who are in fact born within such limits of time. Unless it could be supported as a distinct appointment of certain shares to those of the objects who are capable of taking, leaving the residue unappointed (*t*).

Power to appoint to grandchildren or remoter issue.

Appointment including objects too remote is void.

Accordingly, a power of appointment in a marriage settlement amongst the issue of the intended marriage is restricted in execution to issue born at the death of the parents or within twenty-one years after.—An appointment under such power to children for life, with remainder to their children, would be void as to the latter as being too remote (*u*). And an appointment under such power to a child cannot be postponed in vesting beyond the death of the parents and twenty-one years after. Thus, an appointment to a child to vest on marriage is too remote, being an event which might occur at any time during the life of the child unborn at the date of the settlement (*x*).—So, an appointment to a child for life, with power in the child to appoint by will, is too remote, as to the power by will; because postponed until the death of a person unborn at the date of the settlement (*y*). Although a power given in favour of a living

Power in marriage settlement to appoint to children.

Appointment to child for life with remainder to his children.

To child on marriage.

To child for life with power to appoint by will.

(*r*) Sugden, Powers, 395. See *ante*, pp. 241 *et seq*.

(*s*) Sugden, Powers, 152, 397; *Routledge v. Dorril*, 2 Ves. 357. See *Hodgson v. Halford*, 11 Ch. D. 959; 48 L. J. C. 548.

(*t*) Sugden, Powers, 505; *Griffith v. Pownall*, 13 Sim. 393. See *ante*, p. 327.

(*u*) *Bristow v. Warde*, 2 Ves. jun.

336; *Crompe v. Barrow*, 4 Ves. 681; *Brudenell v. Elwes*, 1 East, 442.

(*x*) *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. C. 410; *Re Gage*, [1898] 1 Ch. 498; 67 L. J. C. 200.

(*y*) *Wollaston v. King*, L. R. 8 Eq. 165; 38 L. J. C. 61, 393; *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. C. 410.

person may be well executed by appointing to him an estate for life, with a power of appointment by will (z).

Powers of sale, etc., may be unrestricted in terms.

Powers of sale and exchange, of leasing, and the like powers which operate only upon the subject of the property in settlement, without affecting the limitations of the settlement otherwise than by transferring them to the new or altered subject of property, may be indefinite in the terms of their creation, as to the period of execution; as where limited to trustees and their heirs, or to trustees and their executors, or to trustees for the time being of a settlement containing powers of renewing the trustees (a).—

Power of sale with consent of tenant for life.

If these powers, by the terms of the instrument by which they are given, can only arise at a period too remote according to the rule they are void (b); but if such powers are conditioned to be executed with the consent of the tenant for life or other person living, they are restricted in exercise within due limits by the express condition of the execution (c).—Such powers, as extending over estates tail in the settlement, are not subject to the rule against perpetuities, because in common with all executory limitations to take effect in defeasance of an estate tail, they may be barred by the disentailing assurance of the tenant in tail, and his power of alienation is not restricted by them (d).

Power of sale extending over estates tail.

Power of sale, etc., restricted to the continuance of the settlement.

But the powers of this kind in a settlement are impliedly restricted to the continuance of the settlement; and when the ultimate remainder or reversion in fee under the limitations of the settlement has vested in possession, giving an absolute power of disposition, the powers can no longer be exercised as a general rule (e). But a power of sale for the purpose of dividing the proceeds amongst beneficiaries is outside the rule against perpetuities, and may be exercised after the vesting of the estate in a person absolutely entitled (f); and if the person absolutely entitled is under disability, as if he is a lunatic, the powers will continue to be exercisable so long as the party continues under disability, provided the rule against perpetuities be not infringed (g).

(z) *Phipson v. Turner*, 9 Sim. 227; *Stark v. Dakyns*, L. R. 10 Ch. 35; 44 L. J. C. 205.

(a) Sugden, Powers, 848; *Wood v. White*, 4 M. & Cr. 460; *Lautsberg v. Collier*, 2 K. & J. 709; 25 L. J. C. 672. See *ante*, pp. 273 *et seq.*

(b) *Goodier v. Edmunds*, [1893] 3 Ch. 455; 92 L. J. C. 649; *Re Appleby*, [1903] 1 Ch. 565; 72 L. J. C. 332. See *Floyer v. Bankes*, L. R. 8 Eq. 115.

(c) Sugden, Powers, 849; see *Wolley v. Jenkins*, 23 Beav. 53; 26 L. J. C. 379.

(d) Sugden, Powers, 850; *Waring v. Croxson*, 1 M. & K. 249; *Wallace v. Freestone*, 10 Sim. 225.

(e) Sugden, Powers, 850; *Wood v. White*, 4 M. & Cr. 460; *Wolley v. Jenkins*, 23 Beav. 53; 26 L. J. C. 370; *Grey v. Jenkins*, 26 Beav. 351; *Re Brown's Settlement*, L. R. 10 Eq. 349; 39 L. J. C. 845; *Re Cotton's Trustees and School Bd. for London*, 19 Ch. D. 624; 51 L. J. C. 514. See *Doncaster v. Doncaster*, 3 K. & J. 26. And see *ante*, p. 275.

(f) *Re Sudeley (Lord) and Buines' Cont.*, [1894] 1 Ch. 334; 63 L. J. C. 194. See *Re Dyson and Fowke's Cont.*, [1896] 2 Ch. 720; 65 L. J. C. 791.

(g) *Re Jump*, [1903] 1 Ch. 129; 72 L. J. C. 16.

## § 2. ACCUMULATION OF RENTS AND PROFITS (a).

Accumulation of rents and profits restricted by statute—exception of provisions for payment of debts, portions, etc.

Accumulation allowed during one only of the statutory periods.

Directions to accumulate in excess of statutory period.

Implied directions to accumulate.

Directions to accumulate in excess of the rule against perpetuities.

Destination of income as to the excess—where the gift of the property is immediate—where it is deferred.

Directions to accumulate after present vesting.

The rule of the common law respecting the abeyance of the freehold (b) rendered dispositions for the accumulation of rents and profits impossible; but the Court of Chancery recognized the validity of dispositions of real as well as of personal estate made for the purpose of accumulating the rents and profits and postponing the beneficial enjoyment; and these were formerly subject to no other restriction of time than that prescribed by the rule against perpetuities, common to all executory limitations; and accordingly an accumulation might be directed during the same period as allowed for suspending the vesting (c). The ultimate affirmance of this decision by the House of Lords was anticipated by a statute still generally known as the Thellusson Act, but officially called the Accumulations Act, 1800 (39 & 40 Geo. III. c. 98) which imposes additional restrictions, and enacts:—"That no person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise however, settle or dispose of any real or personal property so and in such a manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, deviser or testator, or during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the time of the death of such grantor, deviser or testator; or during the minority or respective minorities only of any person or persons who under

Accumulation of rents and profits restricted by statute.

(a) The law against accumulations has been placed here, in anticipation of its proper place in the section on future equitable limitations, on account of the close connection, as regards the object of the law, with the rule against Perpetuities.

(b) See *ante*, p. 33.

(c) *Thellusson v. Woodford*, 4 Ves. 227; 11 Ves. 112; 1 Bos. & P. N. R. 357; *Curtis v. Lukin*, 5 Beav. 147; 11 L. J. C. 380. See *ante*, p. 108; Butler's note (x) to *Fearne*, Ex. Dev. 537.

the uses or trusts of the deed, surrender, will or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interests, dividends or annual produce, so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed" (c). And by the amending statute—the Accumulations Act, 1892 (55 & 56 Vict. c. 58)—the following further restriction has been imposed:—"No person shall, after the passing of this Act (d) settle or dispose of any property in such manner that the rents, issues, profits or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses or trusts of the instrument directing such accumulation would for the time being, if of full age, be entitled to receive the rents issues profits or income so directed to be accumulated" (e).

Proviso as to  
payment of  
debts, por-  
tions, etc.

Section 2 provides "that nothing in this Act contained shall extend to any provision for payment of debts of any grantor settlor or devisor or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements" (f).

One only of  
the statutory  
periods  
allowed.

The Act restricts the power of accumulation to one only of the periods mentioned. Accordingly, where a testator gave his

(c) *Griffiths v. Vere*, 9 Ves. 127; Tud. L. C. Conv. 618; *Re Heathcote*, [1904] 1 Ch. 826; 73 L. J. C. 543. See *Re Pope*, [1901] 1 Ch. 64; 70 L. J. C. 26. The inartificial and ill-defined language of this statute has been frequently adverted to by judges. See Brougham, L. C., *Shaw v. Rhodes*, 1 M. & Cr. at p. 139; Cranworth, L. C., *Edwards v. Tuck*, 3 De G. M. & G. 40, 55; 22 L. J. C. 523; and *Tench v. Cheese*, 6 De G. M. & G. at p. 460; 24 L. J. C. 718; Knight Bruce, L. J., *Edwards v. Tuck*, *supra*.

(d) *Re Llanover (Baroness)*, [1903]

2 Ch. 330; 72 L. J. C. 729.

(e) *Re Danson*, 13 R. 633; *Re Clutterbuck*, [1901] 2 Ch. 285; 70 L. J. C. 614; *Re Llanover (Baroness)*, [1903] 2 Ch. 330; 72 L. J. C. 729.

(f) As to this proviso, see *Evans v. Helliier*, 5 Cl. & F. 114; *Edwards v. Tuck*, 3 De G. M. & G. 40; 22 L. J. C. 523; *Mathews v. Keble*, L. R. 3 Ch. 691; 37 L. J. C. 657; *Re Heathcote*, [1904] 1 Ch. 826; 73 L. J. C. 543; *Re Stephens*, [1904] 1 Ch. 322; 73 L. J. C. 3. And see other cases cited in notes to *Griffiths v. Vere*, 9 Ves. 127; Tud. L. C. Conv. 618.



residuary estate to the first son of A. who should attain twenty-one, so as to involve an accumulation during the minority of such son, and further directed the trustees of that estate to accumulate the income for twenty-one years from his death; it was held that the accumulation must stop at twenty-one years after his death, although no son of A. had then attained twenty-one, and that the direction to accumulate during the minority of the son was void (*h*).

Trusts and directions to accumulate rents and profits are void only so far as they exceed the limits allowed by the Act. Thus a trust by will to accumulate during the life of a person named is held good only for the term of twenty-one years from the death of the testator, and stops at the end of that term (*i*).—So, with a gift to a person upon her marriage with the accumulations of interest from the death of the testator (*j*).—So, an accumulation of income until a certain sum be raised, or a sum required for a certain purpose, cannot be continued beyond twenty-one years (*k*).—And in such cases the term of twenty-one years during which the accumulations may continue commences from the death of the testator, although the accumulations be not directed to commence until a period subsequent to the death (*l*).—A trust by deed to accumulate during the life of a person named is held good only during the life of the grantor, and ceases at his death (*m*).

Trust to accumulate for period in excess of Act is void only as to the excess.

A trust by will to accumulate until an unborn child attains twenty-one, extending through the period before the birth, is not confined to the minority of persons born in the testator's lifetime, but ceases at twenty-one years from the death of the testator if there be not an infant then in existence, and entitled but for the trust (*n*).—The accumulation by the court of surplus income after providing for maintenance of infants is independent of the Act, being a provident mode of applying the rents of his property (*o*).

Accumulation until unborn child attains twenty-one.

Accumulation of infant's estate.

(*h*) *Wilson v. Wilson*, 1 Sim. N. S. 288; 20 L. J. C. 365; *Jagger v. Jagger*, 25 Ch. D. 729; 53 L. J. C. 201; *Re Cattell*, [1907] 1 Ch. 567; 76 L. J. C. 242.

(*i*) *Griffiths v. Vere*, 9 Ves. 127; Tud. L. C. Conv. 618.

(*j*) *Morgan v. Morgan*, 4 De G. & Sm. 164; 20 L. J. C. 109.

(*k*) *Shaw v. Rhodes*, 1 M. & Cr. 135; affd. nom. *Evans v. Hellier*, 5 Cl. & F. 114; *Oddie v. Brown*, 4 De G. & J. 179; 28 L. J. C. 542.

(*l*) *Webb v. Webb*, 2 Beav. 493; *Att.-Gen. v. Poulden*, 3 Hare, 555. See *Gorst v. Lowndes*, 11 Sim. 434; 10 L. J. C. 161.

(*m*) *Re Rosslyn's (Lady) Trust*, 16 Sim. 391; 18 L. J. C. 98.

(*n*) *Edwards v. Tuck*, 3 De G. M. & G. 40; 22 L. J. C. 523; *Tench v. Cheese*, 6 De G. M. & G. 453; 24 L. J. C. 716; *Re Cattell*, [1907] 1 Ch. 567; 76 L. J. C. 242.

(*o*) *Mathews v. Keble*, L. R. 3 Ch. 691; 37 L. J. C. 657.

Implied directions to accumulate are within the Act.

A trust or disposition of property implying or causing an accumulation is as much within the purview of the statute as if an accumulation had been directed in express terms (*p*);—thus, a charge of a certain sum to be raised out of the annual rents and profits, the distribution of which is postponed until the sum is raised, is, in effect, a trust or direction to accumulate, and cannot be continued beyond the period allowed by the Act (*q*). An executory devise, if made in such terms as to include the income until vesting; or a future residuary disposition, as it carries the intermediate income if not otherwise disposed of, involves an accumulation, and is within the Act (*r*).

Powers of maintenance and advancement out of income.

Where the property was directed by will to be accumulated for the ultimate benefit of certain objects, with powers of maintenance and advancement out of the income, the powers, as disposing of the income, were held to continue and to be capable of exercise, notwithstanding they extended beyond the period allowed for accumulating the income (*s*); but this decision can only be regarded as anomalous (*t*).

Trust to pay premiums on policy.

A trust to pay the premiums upon a policy of insurance during the life of a person out of the income of property is not an accumulation of such income within the Act; it is an absolute disposal of it, in consideration of the payment to be made in a certain event under the policy (*u*). So too, a direction to apply a portion of the rents of leaseholds to effect and keep on foot a policy of assurance, to secure the capital value which leaseholds would have realised if sold is valid, notwithstanding it may extend beyond twenty-one years from the testator's death (*v*).

Directions to accumulate in excess of the rule against perpetuities void.

A trust or direction for accumulation which infringes the rule against perpetuities, as directing accumulation for an indefinite period, or a period extending beyond the time allowed by that rule, or as disposing of the accumulations by limitations too remote, is void altogether, independently of the above statute, and is not apportionable as to the time of accumulation; as a proviso in a settlement that during the minorities of any persons becoming successively entitled in possession under the

(*p*) *Cranworth, L. C., Tench v. Cheese*, 6 De G. M. & G. 453; 24 L. J. C. 716; Wood and Selwyn, L. JJ., *Mathews v. Keble*, L. R. 3 Ch. 691, 696, 698; 37 L. J. C. 657.

(*q*) *Shaw v. Rhodes*, 1 M. & Cr. 135; affd. nom. *Evans v. Hellier*, 5 Cl. & F. 114.

(*r*) *McDonald v. Bryce*, 2 Keen, 276; *Morgan v. Morgan*, 4 De G. & Sm. 164;

20 L. J. C. 109, 441.

(*s*) *Pride v. Fooks*, 3 Beav. 430; 9 L. J. C. 232.

(*t*) *Connolly v. Farrell*, 8 Beav. 347; 14 L. J. C. 189.

(*u*) *Bussil v. Foster*, 9 Hare, 177; 20 L. J. C. 641.

(*v*) *Re Gardiner*, [1901] 1 Ch. 697; 70 L. J. C. 407.

settlement, the trustees shall receive and accumulate the rents and profits (*w*). Where a testator created a long term of years upon trust to raise and accumulate an annual sum for the purpose of paying the mortgage debts charged upon the land, it was held that the trust, though not limited in duration, was valid, because the power of the owner of the inheritance, subject only to the mortgages, was not thereby restricted (*x*).

Where there is an absolute and immediate disposition of the property, subject only to a direction for accumulation during an excessive period, the statute in stopping the accumulation beyond the period allowed leaves the disposition of the property discharged from the direction, and entitles the grantee or devisee to the immediate income or possession (*y*).

Destination of income, as to excess.—Where there is an immediate gift of the property.

Where the accumulation is directed for an excessive period, and there is no disposition of the property until the expiration of that period, the statute in stopping the accumulation beyond the period allowed does not accelerate the disposition; but the effect is to withdraw the subsequent income from the disposition of the rest of the property. The subsequent income until the disposition takes effect will then pass under the residuary disposition in the will;—or, if the disposition from which such income is withdrawn be a residuary disposition, it will pass as undisposed of,—either to the next of kin, or to the heir, according to the nature of the property (*z*).—Where a testator devised to trustees upon trust to accumulate the rents until the youngest child of A. attained twenty-one, it was held that the interest of the heir, becoming entitled to the undisposed of rents accruing after twenty-one years from the testator's death until the youngest child should attain twenty-one, was a chattel interest which upon his death passed to his personal representatives (*a*). A trust to invest the accumulations of income of property in the

Where the gift is deferred.

(*w*) *Southampton (Lord) v. Hertford (Marq.)*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Swanst. 432; *Browne v. Stoughton*, 14 Sim. 369; 15 L. J. C. 391; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; 19 L. J. C. 126; *Turvin v. Newcombe*, 3 K. & J. 16.

(*x*) *Bateman v. Hotchkiss*, 10 Beav. 426, and the trust was held to be within the exception of the Act restraining accumulations, being a provision for the payment of debts. See *Briggs v. Oxford (Earl)*, 1 De G. M. & G. 363; 21 L. J. C. 829; *Tewart v. Lawson*, 43 L. J. C. 673; L. R. 18 Eq. 490.

(*y*) *Trickey v. Trickey*, 3 M. & K.

560; *Combe v. Hughes*, 2 De G. J. & S. 657; 34 L. J. C. 344.

(*z*) *Ellis v. Maxwell*, 3 Beav. 587; 10 L. J. C. 266; *Tench v. Cheese*, 6 D. M. & G. 453; 24 L. J. C. 716; *Vine v. Raleigh*, [1891] 2 Ch. 13; 60 L. J. C. 675; *Re Mason*, [1891] 3 Ch. 467; 60 L. J. C. 25; *Re Pope*, [1901] 1 Ch. 64; 70 L. J. C. 26. As to the further income of the accumulations already made until the period of vesting, see *Morgan v. Morgan*, 20 L. J. C. 441; 4 De G. & Sm. 164.

(*a*) *Sewell v. Denny*, 10 Beav. 315. See *ante*, pp. 31, 149.

purchase of land, does not attach upon the income during the period of excess, and such portion of the income passes according to the original nature of the property (*b*).

Direction to accumulate after present vesting.

Where property becomes presently and absolutely vested in a person who is *sui juris*, although it be subject to a trust or direction for accumulation beyond the time of vesting and be directed to be paid at a future period, he is not obliged to let the accumulations continue, but may claim to have the property transferred to him in immediate possession (*c*). The same principle is applicable to a gift to a charity, subject to a direction to accumulate the income, the charity being entitled to present possession, and to put an end to the accumulation of income after the expiration of the legal period (*d*).

## SECTION VI. FUTURE EQUITABLE ESTATES AND INTERESTS IN LAND.

- § 1. The limitation of future equitable estates and interests.
- § 2. Priority of estates and interests in equity.
- § 3. Protection of the legal estate.
- § 4. The doctrine of notice.
- § 5. Tacking and consolidating mortgages ; Marshalling.

### § 1. THE LIMITATION OF FUTURE EQUITABLE ESTATES AND INTERESTS.

Future equitable estates corresponding to legal estates—remainder and reversion—limitation of freehold *in futuro*—in defeasance of prior estate—powers.

The rule against perpetuities—accumulations.

Contingent limitations of equitable estates—vesting of intermediate interest.

The rule in *Shelley's* case applied to equitable limitations.

Future charges upon land of portions, legacies, etc.—construction of charges as vested or contingent—charges upon personality—charges upon both real and personal estate.

Charge of portions subject to advancement—presumption against double portions.

Equitable estates and interests in land have been distinguished into those corresponding with legal estates and those peculiar to equity, having no analogy with legal estates (*a*).

(*b*) *Simmons v. Pitt*, L. R. 8 Ch. 978 ; 43 L. J. C. 267. See *Bestie (Countess) v. Hodgson*, 10 H. L. C. 656 ; 33 L. J. C. 601.

(*c*) *Saunders v. Vautier*, Cr. & Ph. 240 ; 10 L. J. C. 354 ; *Buteman v. Hotchkin*, 10 Beav. 426 ; 16 L. J. C.

514 ; *Norton v. Johnstone*, 30 Ch. D. 649 ; 55 L. J. C. 222. See *Hilton v. Hilton*, L. R. 14 Eq. 468. And see *ante*, p. 328.

(*d*) *Wharton v. Masterman*, [1895] A. C. 186 ; 64 L. J. C. 369.

(*a*) See *ante*, p. 181.

In the limitation of equitable estates, corresponding with legal estates, future estates and interests are, in general, limited in the same manner, and the same language is used and receives the same construction, as in limiting future legal estates;—according to the principle that equity follows the law. Accordingly, the equitable estate may be limited for a particular estate with remainder, or with successive remainders, or leaving a reversion, as at law (*b*).

Future equitable estates corresponding with legal estates.

Remainder and reversion.

But the limitation of the trust or equitable estate is free from the restrictive rules peculiar to the quality of freehold tenure; for these rules are satisfied in their application to the legal estate of the trustee and have no ulterior effect on the beneficial interest. The rule of common law that the freehold cannot be in abeyance, with all its consequences in legal limitations, has no application in equity. Therefore, an equitable estate, freehold in quantity, may be limited to commence at a future time, or upon the happening of a future event, without any preceding freehold estate to support it as a remainder (*c*).

Limitation of freehold in future.

So an equitable estate may be limited to take effect in defeasance or substitution of a preceding estate without awaiting its determination, in the same manner as a shifting use or executory devise (*d*).—The trust or equitable interest in leaseholds or terms of years may be limited with all the freedom of an executory bequest of personal estate (*e*).

Limitations in defeasance of prior estate.

Equitable estates may also be appointed under powers given for that purpose, analogous to and, so far as the quality of the estate permits, governed by the same rules as powers of appointing uses or powers under wills (*f*).

Powers of appointment.

Future limitations of the trust or equitable estate are subject to the same rule against perpetuities as future legal limitations by way of springing use and executory devise, and the rule is applied according to the same principles. “It may be laid down without any qualification that no nearer approach to a perpetuity can be made through the medium of a trust, or will be supported by a court of equity, than can be made by legal conveyances of legal estates or interests or will be admitted in a court of law” (*g*).

Rule against perpetuity applied to equitable limitations.

By means of a trust or direction for that purpose the rents and profits of land may be withdrawn from present ownership,

Trusts for accumulation.

(*b*) See *ante*, pp. 97, 182.

(*c*) See *ante*, p. 108.

(*d*) See *ante*, pp. 108, 253, 260.

(*e*) See *ante*, p. 232; and see *Holmes v. Prescott*, 33 L. J. C. 264.

(*f*) Sugden, Powers, 45. See *ante*, p. 269.

(*g*) Butler's note to Co. Lit. 290 *b*, s. xiv.; Butler's note to Fearn, Ex. Dev. 537. And see *ante*, p. 317.

and accumulated for the benefit of a future and uncertain owner. Such dispositions were impossible at the common law on account of the rule that the freehold could never be in suspense. Trusts and directions to accumulate rents and profits for future disposition are subject to the rule against perpetuities; and they are subject to further restriction by the Accumulations Acts, 1800 and 1892, already noticed (*h*).

Contingent limitations of equitable estates.

The rules restrictive of contingent remainders at the common law have no application in equity. A contingent limitation of the equitable estate, though in the form of a contingent remainder at law, may take effect as and when it is limited to arise, subject only to the rule against perpetuities. It is not affected by the determination of the preceding estate before the happening of the contingency upon which it depends (*i*). Thus under a trust for A. for life and after his death for the children of A. who should attain twenty-one, the trust for the children will not fail by reason of A. dying before any child has attained that age, as would be the case with a contingent remainder at law in the same terms (*k*). So under a trust for A. for life and after his death to the children of B., the trust for the children of B. does not fail upon the death of A. before children of B. exist (*l*).

Intermediate interest until vesting of contingent limitation.

If a contingent limitation be made without any preceding estate, or if a contingent limitation do not vest until after the determination of the preceding estate, the intermediate interest, unless otherwise disposed of, results to the settlor or his heir, or falls into the residue of his estate (*m*).

The rule in *Shelley's* case applied to equitable limitations.

The rule in *Shelley's* case, by which limitations in the form of remainders to the heirs or to the heirs of the body, after an estate of freehold in the ancestor, are referred to the estate of the ancestor, is applied by analogy in construing the like limitations of equitable estates, and upon the same principles upon which it is applied to legal limitations. But it can be applied only where the limitations to the ancestor and to the heirs are

(*h*) See *ante*, p. 335.

(*i*) *Fearne*, Cont. Rem. 303; *Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. C. 316; *Astley v. Micklethwait*, 15 Ch. D. 59; 49 L. J. C. 672; *Re Brooke*, [1894] 1 Ch. 43; 63 L. J. C. 159.

(*k*) *Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. C. 316.

(*l*) *Chapman v. Blisset*, Cas. t. Talb. 145. As to executory devises to children, see *ante*, p. 267.

(*m*) *Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. C. 316; *Best v. Donmall*, 40 L. J. C. 160; and see cases cited *ante*, p. 262, nn. (*o*) & (*p*). In the case of personality a different rule obtains; but where the intermediate income of personality, settled by reference to the limitations of realty involving a contingent limitation, was held to follow the rents of the realty: *Holmes v. Prescott*, 32 L. J. C. 264.

of the same quality; if the estate limited to the ancestor is equitable and the remainder to the heirs is legal, or conversely, the rule is not applicable (*n*).

Where both the limitations are legal, a trust imposed upon one of them does not prevent the application of the rule to the legal limitations; for a court of law, in construing legal limitations, takes no notice of trusts (*o*).

Legal limitation subject to trust.

But the rule in *Shelley's* case is not applied in construing *executory trusts*, which have to be carried out by a conveyance or settlement to be framed according to certain directions, where an application of the rule to the literal terms of such directions would defeat the intended purpose of the trust. As in marriage articles or a devise by will directing that a settlement be made to a person for life with remainder to the heirs of his body, (limitations which in their technical meaning according to the rule in *Shelley's* case would make him tenant in tail in possession with an absolute power over the property,) the trust is executed by a strict settlement, with limitations to the person for life with remainders to his first and other sons successively in tail (*p*).

Application of the rule to executory trusts.

Trusts for conversion, charges of money for portions, legacies, debts, etc., constituting equitable interests in land of a kind peculiar to equity, and having no correspondence with legal estates (*q*), may also be limited to take effect at a future time or upon the happening of some event or contingency, subject only to the rule against perpetuities.

Future charges upon land, of portions, legacies, etc.

With charges of money on land, whether by deed as portions in settlements, or by will as legacies, it is a rule of construction as to the vesting of the charge, that a direction for payment at some future time or event, having reference to the condition or circumstances of the legatee or portioner, as at the age of twenty-one or on marriage, is to be construed as deferring the vesting; so that if the legatee or portioner die before the time, the land is discharged, unless an intention to the contrary appear in the will or instrument (*r*). And the gift of interest on the

Charge to be paid at a certain age or other event affecting the person.

(*n*) *Silvester v. Wilson*, 2 T. R. 444; *Jackson v. Noble*, 2 Keen, 590; 7 L. J. C. 133; *Cooper v. Kynock*, L. R. 7 Ch. 398; 41 L. J. C. 296; *Van Grutten v. Foxwell*, [1897] A. C. 658; 66 L. J. Q. B. 745; *Re Youman's Will*, [1901] 1 Ch. 720; 70 L. J. C. 430. See the rule stated and applied, *ante*, p. 247.

(*o*) Fearnie seems to have been of a contrary opinion. see Cont. Rem. 35; but see Butler's note (*p*) *Ib.*; *Porter v.*

*Bradley*, 1 T. R. 143, 146.

(*p*) *Glenorech (Lord) v. Bosville*, Cas. t. Talb. 3; 2 Wh. & T. L. C. Eq. 763; Fearnie, Cont. Rem. 90, 114. And see as to executory trusts, *ante*, p. 182.

(*q*) See *ante*, pp. 182, 185, 190.

(*r*) *Pawlett v. Pawlett*, 1 Vern. 204, 321; *Chandos (Duke) v. Talbot*, 2 P. Wms. 601 and note, p. 612; *King v. Withers*, Cas. t. Talb. 117; *Erans v. Scott*, 1 H. L. C. 43. As to the origin

Charge to be paid upon death of tenant for life or other event affecting the property.

sum in the meantime for maintenance or otherwise is not sufficient to show an intention to the contrary (s). But if the payment be postponed to a time or event, having reference merely to the condition or convenience of the property, as the death of a tenant for life, and having no reference to the personal condition of the legatee or portioner, the effect of such direction is restricted to the purpose manifestly intended, and it does not affect the vesting (t).

Charges on personalty.

With charges on personal estate a different rule prevails. If there be an independent gift or appropriation, preceded or followed by a direction for payment at a future time, it does not alone defer the vesting ; and if the legatee or portioner die before the time of payment his representatives become entitled, notwithstanding the payment be postponed, unless an intention appear to the contrary. But if the gift and provision for payment are not independent, as if there be a gift "if" or "when," or "at" or "upon" or "after" a person attains twenty-one years, or a direction to pay a legacy or portion under similar conditions, the gift will be considered as contingent (u). So a direction to pay a person upon her marriage does not vest the gift until that event happens (x).

Gift of intermediate income.

In the case of personalty, a gift of the entire income until the time appointed for payment of the capital, presumptively vests the principal ; and a direction to apply the whole income by way of maintenance will give rise to the same presumption although a discretionary power be given to apply a less sum for that purpose (y). But if the intermediate income is directed to be accumulated and paid at the same time as the principal, the gift is presumptively contingent (z).

These rules of construction are applicable to charges upon terms of years (a), or upon the proceeds of sale of land sold under a trust for conversion (b).

In consequence of the above distinction in the effect of a

of the rule, see Butler's note (1) to Co. Lit. 237 a, and note (g) to Fearn, Ex. Dev. 552.

(s) *Pawlett v. Pawlett*, 1 Vern. 204, 321 ; *Hubert v. Parsons*, 2 Ves. sen. 261 ; *Watkins v. Check*, 2 Sim. & S. 199.

(t) *Remnant v. Hood*, 2 D. F. & J. 396 ; 30 L. J. C. 71 ; *Davies v. Huguenin*, 1 H. & M. 730 ; 32 L. J. C. 417.

(u) *Hansen v. Graham*, 6 Ves. 239 ; *Leake v. Robinson*, 2 Mer. 363 ; *Lister v. Bradley*, 1 Hare, 10 ; 11 L. J. C. 49 ; *Re Bartholomew's Trust*, 1 Mac. & G. 354 ; 19 L. J. C. 237.

(x) *Morgan v. Morgan*, 4 De G. & Sm.

164 ; 20 L. J. C. 109, 441.

(y) *Batsford v. Kebbell*, 3 Ves. 363 ; *Bell v. Cude*, 2 J. & H. 122 ; 31 L. J. C. 383 ; *Re Holt's Estate*, 45 L. J. C. 208 ; *Re Williams*, [1907] 1 Ch. 180 ; 76 L. J. C. 41.

(z) *Knight v. Knight*, 2 Sim. & S. 490 ; *Saunders v. Vautier*, Cr. & P. 240 ; 10 L. J. C. 354 ; *Re Thurston's Will*, 17 Sim. 21 ; 18 L. J. C. 437. See *Blease v. Burgh*, 2 Beav. 221 ; 9 L. J. C. 226.

(a) *Re Hudsons, Drury*, 6.

(b) *Re Hart's Trusts*, 3 De G. & J. 195 ; 28 L. J. C. 7. See *Re Bunn*, 16 Ch. D. 47.



direction for future payment upon the vesting of charges, as operating upon real or personal estate, it may happen that a legacy originally charged both on real and personal estate may fail as against the real estate by reason of the death of the legatee before the time of payment, but remain a charge upon the personalty; as in the case of a legacy given to a person and made payable at twenty-one, and the legatee dying under twenty-one (*c*).

Charge upon both real and personal estate.

Portions charged in settlements of land to be raised upon the death of the parents are usually made subject to an express proviso that an advancement made by the parents in their lifetime shall be taken in satisfaction, unless expressly declared not to be so intended (*d*). Under such a proviso a devise or bequest by will of the parent would not, in general, operate as an advancement in his lifetime in satisfaction of the portion (*e*).

Portions charged subject to satisfaction by advancement.

Where the settlement of the portions is made by a parent, or one who stands *in loco parentis* to the portioners, and there is no express provision relative to satisfaction by advancement or otherwise, there is a general presumption of equity against double portions, and in favour of satisfaction by an advancement; which, however, is capable of being rebutted by the nature and circumstances of the advancement. Where the settlor is a stranger to the portioners there is no such presumption, and the effect of an advancement is strictly a question of construction (*f*).

Presumption against double portions.

(*c*) *Chandos (Duke) v. Talbot*, 2 P. Wms. 601; *Prowse v. Abington*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135; *Parker v. Hodgson*, 1 Dr. & Sm. 568; 30 L. J. C. 590.  
 notes to *Ex p. Pyc*, 18 Ves. 140; 2 Wh. & T. L. C. Eq. 366.  
 (*e*) *Cooper v. Cooper*, L. R. 8 Ch. 813; 43 L. J. C. 158.  
 (*f*) *Ex p. Pyc*, 18 Ves. 140; 2 Wh. & T. L. C. Eq. 366.  
 (*d*) See 2 Pridaux Conv. 284, 7th ed.; 2 Hayes Conv. 63, 5th ed.; and see

## § 2. THE PRIORITY OF ESTATES AND INTERESTS IN EQUITY.

Priority of estates and interests in equity.

Priority of acquisition gives prior equity.

Priority lost by fraud or negligence.

Negligence as to the custody of title deeds—trusting to representations as to the deeds.

Trustee depositing deeds in breach of trust.

Vendor signing receipt for purchase money.

Priority by notice to trustee of equitable interest in personalty or money charged upon land—no priority in equitable estates in land by notice to trustee—notice upon change of trustees.

Priority of estates and interests in equity.

Estates and interests may be created in the same property not in a prescribed series of limitations, but upon various and independent occasions; and questions may then arise as to their priority or relative times of taking effect, which cannot be determined merely by construction of the terms of limitation, but are to be decided by the rules and principles of equity.

Examples.

For example, the equity of redemption in mortgaged land may be mortgaged or charged successively to two persons, between whom may consequently arise a conflict of claims to priority (*a*).—An interest in the proceeds of real estate under a trust for conversion, or a charge to be raised by sale or mortgage may be assigned to two persons successively, thereby raising a question of priority (*b*).—A purchaser of land, having taken a conveyance subject to a lien or charge of the vendor for unpaid purchase money, may sell or charge the same land in favour of a third person, and a conflict of claims may thus arise between the vendor and the subsequent incumbrancer (*c*).—A trustee by his dealings with the trust property may raise a conflict of equities with the *cestui que trust* (*d*).

Priority of acquisition gives prior equity.

The general rule of equity as to the priority of estates and interests created or arising on different occasions in the same

(*a*) *Jones v. Jones*, 8 Sim. 633; 7 L. J. C. 164; *Wilmot v. Pike*, 5 Hare, 14; *Frazier v. Jones*, 5 Hare, 475; affd. 17 L. J. C. 353; *Taylor v. London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477.

(*b*) See *Lee v. Howlett*, 2 K. & J. 531; *Hughes' Trusts*, 2 H. & M. 89; 33 L. J. C. 725.

(*c*) *Mackreth v. Simmons*, 15 Ves. 329; 2 Wh. & T. L. C. Eq. 926; *Rice v.*

*Rice*, 2 Drew. 73; 23 L. J. C. 289.

(*d*) *Dance v. Goldingham*, L. R. 8 Ch. 902; 42 L. J. C. 777; *Turner v. Smith*, [1901] 1 Ch. 213; 70 L. J. C. 144; *Taylor v. London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477. The fraudulent concealment from the purchaser of any deed or instrument material to the title, or any incumbrance, is a statutory misdemeanour. See *post*, p. 366.

subject of property is that they rank in order of the time of acquisition.—“Every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding) makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, *qui prior est tempore potior est jure*.—And it is quite immaterial whether the subsequent incumbrancers at the time they took their securities and paid their money had notice of the first incumbrance or not” (e). In the case of after acquired property of a bankrupt, a bankrupt is entitled, until his trustee in bankruptcy intervenes, to confer a title to an equitable interest in leasehold land paramount to that of the trustee in bankruptcy, but not where the equitable interest is in freehold lands (f).

But this rule is only resorted to where the equities are in all other respects equal, and where there is no other sufficient ground for preferring the owner of one conflicting interest to another; and the priority in equity due to priority of acquisition may be rebutted and lost by circumstances of fraud, misrepresentation, or negligence in the conduct of the prior claimant relatively to the subsequent claimant (g).

Priority lost  
by fraud or  
negligence.

A purchaser or mortgagee of the legal estate in land should obtain possession of the title deeds relating to the land, and if he fails to do so may be postponed to a person who subsequently acquires for value an interest in the property without notice of the prior dealing with the land. But he will only be so postponed where there has been fraud or concealment on his part or concurrence in some fraudulent purpose, or negligence so gross as to

Negligence as  
to the custody  
of title deeds.

(e) *Per* Westbury, L. C., *Phillips v. Phillips*, 4 De G. F. & J. 208, 215; 31 L. J. C. 321; *Dixon v. Muckleston*, L. R. 8 Ch. 155; 42 L. J. C. 213; *Care v. Cave*, 15 Ch. D. 639; 49 L. J. C. 505. How far an assignee is bound by the equities affecting an equitable interest, see *post*, p. 354. As to the protection afforded by the legal estate, see *post*,

p. 350.

(f) *Official Receiver v. Cooke*, [1906] 2 Ch. 661; 75 L. J. C. 757. See *Hunt v. Fripp*, [1898] 1 Ch. 675; 67 L. J. C. 377.

(g) *Per* Kindersley, V.-C., in *Rice v. Rice*, 2 Drew. 73; 23 L. J. C. 291; *Taylor v. London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477.

amount to evidence of a fraudulent intention (*h*). But a person who accepts as true the representation that all the deeds relating to the property are being handed over is not guilty of negligence where the mere inspection of the documents handed over would not disclose the fact that material documents are being retained (*i*); and one of two or more trustees is entitled to permit his co-trustee to retain the exclusive possession of title deeds, unless he has reason to believe that his co-trustee will act improperly (*k*).

Negligence in giving back possession of deeds.

So, too, if the possession of deeds is parted with, the title of the true owner will not be displaced "unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention" (*l*). But where a mortgagee hands back title deeds to his mortgagor to enable him to raise money, he cannot be heard to complain if the mortgagor, in breach of confidence, raises an excessive amount, or fails to preserve the original priorities (*m*). But a greater degree of negligence is required to displace the title of a mortgagee to whom the legal estate has been conveyed, than where there is a conflict between two persons who only have equitable titles (*n*).

Trustee depositing title deeds in breach of trust.

Where a trustee, having the legal custody of the title deeds in right of his trust, deposits them, in breach of trust, as security for an advance to himself, the *cestui que trust*, if not guilty of any negligence in the matter, as having the prior equity is preferred (*o*).

Vendor signing receipt for purchase money.

A vendor having a lien for unpaid purchase money, who had executed a conveyance acknowledging the payment of the money both in the body of the deed with a receipt for the purchase

(*h*) *Colyer v. Finch*, 5 H. L. C. 905; 26 L. J. C. 65; *Manners v. Mew*, 29 Ch. D. 725; *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263; 58 L. J. C. 688; *Oliver v. Hinton*, [1899] 2 Ch. 264; 68 L. J. C. 583; *Re Castell and Brown, Ltd.*, [1898] 1 Ch. 315; 67 L. J. C. 169; *Re Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654; 72 L. J. C. 674; *Walker v. Linom*, [1907] 2 Ch. 104; 76 L. J. C. 500.

(*i*) *Frazer v. Jones*, 5 Hare, 575; affd. 17 L. J. C. 353; *Dixon v. Mucklestone*, L. R. 8 Ch. 155; 42 L. J. C. 210.

(*k*) *Taylor v. London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477. See *Cottam v. Eastern Counties Ry.*, 1 J. & H. 243; 30 L. J. C. 217; *Re Sisson's Trusts*, [1903] 1 Ch. 262; 72 L. J. C. 212.

(*l*) *Evans v. Bicknell*, 6 Ves. 174;

*Northern Counties of England Fire Ins. v. Whipp*, 26 Ch. D. 482; 53 L. J. C. 629; *Waldron v. Sloper*, 1 Drew. 193.

(*m*) *Perry Herrick v. Attwood*, 2 De G. & J. 21; 27 L. J. C. 121; *Briggs v. Jones*, L. R. 10 Eq. 92; *Brocklesby v. Temperance Permanent Bg. Soc.*, [1895] A. C. 173; 64 L. J. C. 433; *Re Castell and Brown, Ltd.*, [1898] 1 Ch. 315; 67 L. J. C. 169.

(*n*) *Farrand v. Yorks. Bkg. Co.*, 40 Ch. D. 182; 58 L. J. C. 238; *Nat. Prov. Bk. v. Jackson*, 33 Ch. D. 1. See *Taylor v. Russell*, [1892] A. C. 244; 61 L. J. C. 657; affg. [1891] 1 Ch. 8; 59 L. J. C. 756.

(*o*) *Stackhouse v. Jersey (Countess)*, 1 J. & H. 721; 30 L. J. C. 421; *Cave v. Cure*, 15 Ch. D. 639; 49 L. J. C. 505. See *Pilcher v. Rawlins*, L. R. 7 Ch. 259; 41 L. J. C. 485.

money indorsed, and had delivered over the title deeds, was held to be estopped from setting up his lien in priority to a subsequent mortgagee from the purchaser who had lent money upon a deposit of the deeds without notice of the claim (*p*). Since the Conveyancing and Law of Property Act, 1881, s. 55, it has become unusual to make the double acknowledgment of the consideration money, and a receipt in the body of a deed is sufficient to establish the estoppel (*q*).

If the subject of property be of the nature of personal chattels, which pass at law by delivery of possession, the priority of an assignee or person acquiring an equitable interest may be varied upon giving notice of his interest to the trustee, as is also the case with regard to the assignment of debts or other choses in action. Notice is not necessary to perfect the title of the assignee (*r*), but until notice of the assignment, an accounting party may deal with the assignor, and those claiming under him by subsequent assignments, on the footing that the first assignment does not exist (*s*).

Priority by notice to trustee.

And an assignee of an equitable interest in pure personalty, or of a debt, by giving notice to the trustee or the debtor may gain priority over a prior assignee of the same equitable interest or debt (*t*), provided he has no notice of the prior interest when he pays his money (*u*).

Accordingly upon an assignment of an interest in the proceeds of real estate under trust for sale and conversion, or in a charge to be raised by sale or mortgage, being of the nature of a personal chattel, the assignee must give notice to the trustee to secure his priority over other claims (*x*).

Notice required upon assignment of money charged upon land.

(*p*) *Rice v. Rice*, 2 Drew. 73; 23 L. J. C. 291; *White v. Wakefield*, 7 Sim. 401; 4 L. J. C. 195; *Hunter v. Walters*, L. R. 7 Ch. 75; 41 L. J. C. 175. See *Bickerton v. Walker*, 31 Ch. D. 151; 55 L. J. C. 227. As to a receipt in an unusual form or place, see *Kennedy v. Green*, 3 M. & K. 699; and see *post*, p. 359.

(*q*) *Lloyd's Bk. v. Bullock*, [1896] 2 Ch. 192; 65 L. J. C. 680; *Rimmer v. Webster*, [1902] 2 Ch. 163; 71 L. J. C. 561; *Buteman v. Hunt*, [1904] 2 K. B. 530; 73 L. J. K. B. 782.

(*r*) *Re Holmes*, 29 Ch. D. 786; 55 L. J. C. 33; *Gorringe v. Inwell India Rubber and Gutta Percha Works*, 34 Ch. D. 128; 56 L. J. C. 85. See *Newman v. Newman*, 28 Ch. D. 674; 54 L. J. C. 598.

(*s*) *Stocks v. Dobson*, 4 De G. M. & G.

11; 22 L. J. C. 884. See *Montefiore v. Guedalla*, [1903] 2 Ch. 26; 72 L. J. C. 412.

(*t*) *Dearle v. Hall*, 3 Russ. 1; *Lovell v. Cooper*, 3 Russ. 58; *Ward v. Duncombe*, [1893] A. C. 369; 62 L. J. C. 881; *Re Wusdale*, [1899] 1 Ch. 163; 68 L. J. C. 117; *Marchant v. Morton, Down & Co.*, [1901] 2 K. B. 829; 70 L. J. Q. B. 820; *Re Dallas*, [1904] 2 Ch. 385; 73 L. J. C. 365. And see as to assignments within s. 25 (6) of the Judicature Act, 1873, Leake, *Contracts*, pp. 823 *et seq.*

(*u*) *Re Holmes*, 29 Ch. D. 786; 55 L. J. C. 33.

(*x*) *Foster v. Cockerell*, 3 Cl. & F. 456; *Lee v. Howlett*, 2 K. & J. 531; *Hughes' Trusts*, 2 H. & M. 89; 33 L. J. C. 725; *Arden v. Arden*, 29 Ch. D. 702; 54 L. J. C. 655.

Notice not required for equitable estates in land.

But equitable estates and interests in the land (including chattels real) corresponding to legal estates, though the legal estate be vested in a trustee, follow the analogy of legal estates; and their priority is independent of notice to the trustee and is subject to the general rule of priority of acquisition.

No priority by notice to legal mortgagee.

Thus, with the equity of redemption of a legal mortgage, as between successive mortgagees, no priority is acquired by a notice given to the first mortgagee of the legal estate; but they are entitled in order of time, notwithstanding such notice given (*y*).

Notice upon change of trustees.

A priority once acquired by notice given to all the trustees, remains notwithstanding a change of trustees, for it is not the duty of the new trustees, nor is it the practice of the court, to inquire respecting notices given to the old trustees; but the new trustees are not responsible for acts done in disregard of notices of which they are in fact ignorant (*z*). Notice to one of joint trustees is sufficient; but upon his death it does not survive with the property to the others (*a*). And notice to one of the trustees, not being himself the assignor, is sufficient, although he be at the same time interested in the property, and might by concealing the notice make a subsequent assignment (*b*).

### § 3. PROTECTION OF THE LEGAL ESTATE.

Protection of the legal estate against prior claims.

Protection of the legal estate to a purchaser for value without notice.

Purchaser without notice obtaining legal estate after notice—from a trustee—from a prior mortgagee.

Purchaser with notice from purchaser without notice—Purchaser without notice from purchaser with notice—repurchase by trustee.

Prior claims paramount to vendor—claim to set aside or correct the legal title.

Equitable remedies—available to purchaser having the legal estate.

Plea of purchase for value without notice—is inapplicable between merely equitable claims.

Assignee of equitable interest takes it subject to equities without notice.

Protection of the legal estate against prior claims.

A person invested with the legal estate, or having obtained any legal advantage, shall not be deprived as a general rule of

(*y*) *Union Bk. of London v. Kent*, 39 Ch. D. 288; 57 L. J. C. 1022; *Re Richards*, 45 Ch. D. 589; 59 L. J. C. 728; *Hopkins v. Hemsworth*, [1898] 2 Ch. 347; 67 L. J. C. 526; *Taylor v. London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477.

(*z*) *Phipps v. Lovegrove*, L. R. 16 Eq. 80; 4 L. J. C. 892; *Ward v. Duncombe*, [1893] A. C. 369; 62 L. J. C. 881; *Re*

*Wasdale*, [1899] 1 Ch. 163; 68 L. J. C. 117. See *Lowe v. Bouverie*, [1891] 3 Ch. 82; 60 L. J. C. 594.

(*a*) *Meux v. Bell*, 1 Hare, 73; 11 L. J. C. 77.

(*b*) *Browne v. Savage*, 4 Drew. 635; *Wiles v. Greenhill*, 4 De G. F. & J. 147; 31 L. J. C. 1; *Re Dallas*, [1904] 2 Ch. 385; 73 L. J. C. 365.

that estate or advantage at the suit of another whose claim to be preferred rests upon priority of acquisition, unless some further grounds of preference can be shown (*a*).

In the case of copyholds, unless the surrender must be presented within particular limits of time, a first mortgagee will not be postponed to a subsequent incumbrancer by reason only of delay in perfecting his security by admittance (*b*). The priority or protection given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land was abrogated by sect. 7 of the Vendor and Purchaser Act, 1874, with a saving in favour of any then existing priority or protection; but this section was repealed by sect. 129 of the Land Transfer Act, 1875, "except as to anything duly done thereunder before the commencement of this Act." The defence is a purely equitable defence, and where prior to the Judicature Act, 1873, the plaintiff could have succeeded in an action at law, without being restrained by a court of equity from pursuing his legal remedy, a plea of a purchase for value without notice affords no answer (*c*).

To establish the plea of a purchase for value without notice two elements are necessary. First, it must appear that value was given; but this is not restricted to money payments (*d*). And the person conveying the legal estate need not receive any benefit from the consideration (*e*). In the next place it must appear that at the date when he took his conveyance of the legal estate, and at the time when he paid his purchase money, where money passes, the person relying on the plea had no notice of a prior equitable title (*f*). But the acquisition of the legal estate need not be contemporaneous with the payment of the purchase money except where the conveying party is a trustee; and with the like exception, a person who has *bonâ fide*

Protection of the legal estate to a purchaser for value without notice.

(*a*) *Frazer v. Jones*, 5 Ha. 475; *affd.* 17 L. J. C. 353; *Newman v. Newman*, 28 Ch. D. 674; 54 L. J. C. 598; *Taylor v. Russell*, [1891] 1 Ch. 8; 60 L. J. C. 1; *affd.*, [1892] A. C. 244; 61 L. J. C. 657; *Bailey v. Barnes*, [1894] 1 Ch. 25; 63 L. J. C. 73. See *Ind. Coope & Co. v. Emmerson*, 12 App. Cas. 300; 56 L. J. C. 989.

(*b*) *Horlock v. Priestley*, 2 Sim. 75. See *Whitbread v. Jordan* 1 Y. & C. Ex. 303; 4 L. J. Ex. Eq. 38; *Cole v. Coles*, 6 Hare, 517; *affd.* 12 L. T. O. S. 237.

(*c*) *Re Cooper*, 20 Ch. D. 611; 51 L. J. C. 864; *Re Ingham*, [1893] 1 Ch.

352; 62 L. J. C. 100.

(*d*) *Molony v. Kernan*, 2 Dr. & War. 31; *Dilkes v. Broadmead*, 2 De G. F. & J. 566; 30 L. J. C. 268. See *Gale v. Gale*, 6 Ch. D. 144; 46 L. J. C. 809.

(*e*) *Taylor v. Russell*, [1892] A. C. 244; 61 L. J. C. 657.

(*f*) *Tourville v. Naish*, 3 P. Wms. 307; *Jackson v. Rowe*, 4 Russ. 514; *Allen v. Knight*, 5 Ha. 272; *affd.* 16 L. J. C. 370; *Tildesley v. Lodge*, 3 Sm. & G. 543; *Taylor v. London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477. See *Sharpe v. Foy*, L. R. 4 Ch. 35.

paid money without notice of any other title, though at the time of the payment he gets nothing but an equitable title, may afterwards perfect his title by acquiring the legal estate notwithstanding he then has notice of a prior dealing, inconsistent with the good faith of the dealing with himself (*g*).

Purchaser  
without notice  
obtaining  
legal estate  
from trustee.

Where a purchaser acquires the legal estate from a trustee contemporaneously with the payment of his money, but without notice of the trust, he may successfully resist the claim of the beneficiaries (*h*). But if he obtains the legal estate at a date subsequent to the payment of his money, the title of the beneficiaries will prevail (*i*). But he cannot maintain this defence where he has taken the legal estate from a trustee for the prior claimant, after notice of the trust; for by taking a conveyance with notice of the trust he becomes affected with the same trust, and will not be allowed to retain the legal estate against it (*j*).

Mortgagee  
not a trustee  
for subse-  
quent  
claimant.

It may be observed that a legal mortgagee is not a trustee for any ulterior claimants, although he may have notice of them; he holds the estate in his own right until he be paid off, upon the happening of which event he becomes a trustee of the legal estate for the persons interested in the equity of redemption according to their priorities, and his transferee holds it equally unfettered with trusts (*k*). But the transferee of a mortgage debt, without the concurrence of the mortgagor, is in no better position than the mortgagee in respect of the debt transferred; and if that debt be invalid, he obtains no charge upon the land, though he gave a valuable consideration and had no notice of the invalidity (*l*).

Purchaser  
with notice  
from pur-  
chaser with-  
out notice.

The plea of purchaser for value without notice in respect of the legal estate is available to all purchasers or claimants under such purchaser; they may rely upon the position of the vendor at the time of his purchase, though they took after notice to him or to themselves (*m*). It is also available to a subpurchaser for

(*g*) *Blackwood v. London Chartered Bk. of Australia*, L. R. 5 P. C. 92; 43 L. J. P. C. 25; *Taylor v. Russell*, [1892] A. C. 244; 61 L. J. C. 657. And see *post*, p. 365.

(*h*) *Pilcher v. Rawlins*, L. R. 7 Ch. 259; 41 L. J. C. 489.

(*i*) *Maryfield v. Burton*, L. R. 17 Eq. 15; 43 L. J. C. 46. See *Bates v. Johnson*, Johns. 304; 29 L. J. C. 509; *Heath v. Crealock*, L. R. 10 Ch. 22; 44 L. J. C. 157.

(*j*) *Burt v. Trueman*, 29 L. J. C. 902; *Mumford v. Stohwasser*, L. R. 18 Eq. 556; 43 L. J. C. 694; *Harpham v. Shacklock*, 19 Ch. D. 207; *Taylor v.*

*London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477.

(*k*) *Taylor v. Russell*, [1892] A. C. 244; 61 L. J. C. 657; *Bailey v. Barnes*, [1894] 1 Ch. 25; 63 L. J. C. 73. See *Hosking v. Smith*, 13 App. Cas. 582; 58 L. J. C. 367. And see *ante*, p. 216; *post*, p. 366.

(*l*) *Burt v. Trueman*, 29 L. J. C. 902; *Parker v. Clarke*, 30 Beav. 54; *Forley v. Cooke*, 1 Giff. 230; 27 L. J. C. 185. See *Bickerton v. Walker*, 31 Ch. D. 151; 55 L. J. C. 227.

(*m*) *Harrison v. Forth*, Prec. Ch. 51; *Sweet v. Snithcote*, 2 Bro. C. C. 66.



value without notice, although his vendor was affected with notice originally (*n*).—But if the trustee who has conveyed the land to a purchaser for value without notice, himself repurchase the land, though for a valuable consideration, he cannot rely upon the title of his vendor; but the land in his hands will be again charged with the trust (*o*).

Purchaser without notice from purchaser with notice.  
Repurchase by trustee.

The protection of the legal estate to a purchaser for value without notice is available not only against claims under the same vendor, but also against claims paramount to his title, as where the vendor, as to the equitable title, was in possession under a forged will (*p*), or where a purchaser for value without notice might rely upon deeds to prove his legal title, which had been concealed from him, though the deeds disclosed trusts in favour of a prior claimant (*q*).

Prior claims paramount to title of vendor.

So, too, where a mortgagee was induced to convey the legal estate to a purchaser in fee, upon misrepresentation which entitled him to set aside the conveyance on the ground of fraud, the purchaser who had no notice of the facts and obtained the conveyance contemporaneously with the payment of his money was held entitled to retain the benefit of his purchase, but other purchasers to whom the legal estate was conveyed after an interval of time had elapsed since the payment of the purchase money, were held to be only assignees of the equity of redemption, but the court refused as against all the purchasers to make a decree for the delivery up of the title deeds (*r*).

So, a suit to set aside or correct a deed for fraud or mistake, under which the defendant derives a legal title, may be met by the plea that he is a purchaser for value without notice (*s*).

Claim to set aside or amend the legal title.

A purchaser or mortgagee who has obtained the legal title without notice and without complicity in any fraud, is entitled to exercise all his legal rights and remedies against other purchasers or incumbrancers for value without notice, without restraint in equity; and is further entitled to all the ordinary equitable remedies, whether by way of relief or discovery, which under the concurrent jurisdiction of courts of equity are incident

Equitable remedies available to purchaser having legal title.

(*n*) *Lowther v. Carlton*, Cas. t. Talb. 187; *Harrison v. Forth*, Prec. Ch. 51.

(*o*) *Bovey v. Smith*, 1 Vern. 60, 84, 144. See *Delves v. Gray*, [1902] 2 Ch. 606; 71 L. J. C. 808.

(*p*) *Jones v. Powles*, 3 M. & K. 581; 3 L. J. C. 210.

(*q*) *Pitcher v. Rawlins*, L. R. 7 Ch.

259; 41 L. J. C. 74; and see *post*, p. 358.

(*r*) *Heath v. Crealock*, L. R. 18 Eq. 215; 43 L. J. C. 169; on appeal, L. R. 10 Ch. 22; 44 L. J. C. 157.

(*s*) *Per Westbury*, L. C., in *Phillips v. Phillips*, 4 De G. F. & J. 208; 31 L. J. C. 326.

to the legal estate (*t*). Accordingly, a legal mortgagee may foreclose against a purchaser or incumbrancer for value without notice; for he is thereby only standing upon his legal title and exercising his right to call upon the adverse claimant to redeem (*u*).

But a court of equity will not exercise its auxiliary jurisdiction in aid of a legal title against a purchaser for value without notice, so as to deprive him of any legal defence or advantage which he may possess. Thus, to a bill by the heir for discovery and specific delivery of title deeds, the plea that the defendant is a purchaser for value without notice is a good defence (*x*).—And accordingly, a legal mortgagee claiming foreclosure, as against a purchaser for value without notice who was in possession of the title deeds, was held, though entitled to foreclosure, not to be entitled to an order for the delivery up of the deeds (*y*).

Plea of purchase for value not applicable between adverse claims purely equitable.

But the principle has no application to purely equitable claims, where the legal estate is outstanding, and the beneficial interest is claimed by several adverse but equally innocent purchasers for value without notice; the court may then be called upon to declare the right to the estate in question. In such cases the court necessarily makes a decree against some one or more purchasers for value; and such a decree will further regulate the disposition of the legal estate and the possession of the title deeds, if necessary to complete and enforce the equitable title (*z*).

Assignee of equitable interest takes it subject to equities without notice.

The purchaser of a purely equitable interest *primâ facie* takes it subject to all the equities chargeable against his vendor in respect of it, though he gave a valuable consideration and had no notice. So far as depends upon his purchase, and independently of the conduct of adverse claimants, he can take no better title than his vendor (*a*). Thus, mortgagees who took an assignment of an equity of redemption in the name of a third

(*t*) *Williams v. Lambe*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 Russ. & M. 284; *Ind, Coupe & Co. v. Emmerson*, 12 App. Cas. 300; 56 L. J. C. 989.

(*u*) *Colyer v. Finch*, 19 Beav. 500; affd. 5 H. L. C. 905; 26 L. J. C. 65; *Heath v. Crealock*, L. R. 10 Ch. 22; 44 L. J. C. 157.

(*x*) *Basset v. Nosworthy*, Cas. t. Finch, 102; 2 Wh. & T. L. C. 150. See *Walwyn v. Lee*, 9 Vcs. 24; *Joyce v. De Moleyns*, 2 Jo. & Lat. 274.

(*y*) *Head v. Egerton*, 3 P. Wms. 280; *Hunt v. Elmes*, 2 De G. F. & J. 578; 30 L. J. C. 255; *Heath v. Crealock*, L. R.

10 Ch. 22; 44 L. J. C. 157.

(*z*) *Phillips v. Phillips*, 4 De G. F. & J. 208; 31 L. J. C. 321; *Newton v. Newton*, L. R. 4 Ch. 143; 38 L. J. C. 145; *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263; 58 L. J. C. 688. See *Care v. Care*, 15 Ch. D. 639; 49 L. J. C. 505.

(*a*) *Phillips v. Phillips*, 4 De G. F. & J. 208; 31 L. J. C. 321; *Dixon v. Muckleston*, L. R. 8 Ch. 155; 42 L. J. C. 213; *Care v. Care*, 15 Ch. D. 639; 49 L. J. C. 505. See *Edgar v. Plomley*, [1900] A. C. 431; 69 L. J. P. C. 95.

person, from whom they obtained a declaration of trust in their favour, were held to have priority over an equitable mortgagee from the trustee who had deposited the assignment of the term subject to the mortgage (*b*). And an assignee without notice from an equitable mortgagee affected with notice of a prior charge, is equally bound by the prior charge (*c*). So if he have obtained the mortgage by a fraud entitling the mortgagor to have it set aside, his assignee though without notice takes it subject to the equitable relief against the fraud (*d*).

#### § 4. THE DOCTRINES OF NOTICE.

Notice of prior claim—notice before payment or before conveyance.

Actual and constructive notice—duty of inquiry.

Notice of deeds belonging to the title and their contents—trusting to representations as to the deeds—notice of possession of deeds by third parties—deeds suppressed by fraud or accident—informality or defect in deeds.

Constructive notice from the possession of the land—rights of occupants.

Notice to solicitor or agent—solicitor also solicitor of vendor—fraud of solicitor.

*Lis pendens*.

Crown debts.

Judgments—judgment operates only upon beneficial interest of debtor.

Registration in Middlesex and Yorkshire—notice prevails notwithstanding registration—registration under 25 & 26 Vict. c. 53.

A purchaser of real estate is under no legal obligation to investigate his vendor's title; while, on the other hand, it is the duty of the vendor to disclose what his title is. Nevertheless "in dealing with real property, as in other matters of business, regard is to be had to the usual course of business; and a purchaser who wilfully departs from it, in order to avoid acquiring a knowledge of his vendor's title, is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way" (*a*). Accordingly a vendor must disclose all facts known to the purchaser prior to the time when the contract is entered into, under peril, if the facts turn out to be material,

Notice of  
prior claim.

(*b*) *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263; 58 L. J. C. 688. 21 L. J. C. 545. See the cases cited *ante*, p. 352 (*l*).

(*c*) *Ford v. White*, 16 Beav. 120. (*a*) *Per curiam, Bailey v. Barnes*, [1894] 1 Ch. 25; 63 L. J. C. 73.

(*d*) *Cockell v. T aylor*, 15 Beav. 103;

of having the contract set aside at the instance of the latter (*b*); but a purchaser or incumbrancer acquiring any estate or interest after notice of a prior claim acquires such interest only as he knows his vendor can justly dispose of. He cannot, therefore, claim any priority or protection by reason of holding any legal estate or advantage; but in respect of such legal estate he will be in the position of a trustee for the prior claimant of whose rights he had notice (*c*).—Also any question of fraud or negligence on the part of the prior claimant relatively to himself, as a ground of priority, would, in general, be excluded by the fact of his knowledge of the prior claim (*d*). It becomes important, therefore, on the above grounds to consider the doctrines of notice as affecting priority in equity.

Notice before  
payment, or  
before con-  
veyance.

Though a purchaser or incumbrancer have no notice at the time of contracting for the purchase or charge, yet if he receive notice before payment of the purchase money or consideration, notwithstanding he have given security for it, he will take the property subject to the prior claim, and although he has paid the purchase money without notice, if he receive notice before taking the conveyance, he will be entitled to no protection or preference from the legal estate (*e*).

Actual and  
constructive  
notice.

Notice may be actual as a matter of fact; or constructive, that is, which is imputed to a person by presumption or rule of law.

Duty of in-  
quiry.

It is, of course, open to a purchaser to use greater diligence than the law requires, and to refuse to accept a title in respect of matters which he has discovered by his diligence, and of which he would not have been deemed to have notice, if he had abstained from making inquiries (*f*).

The whole law on the subject has been remodelled by sect. 3 of the Conveyancing Act, 1882, which is retrospective in its operation, and is, so far as material, in the following terms:—“(1) A purchaser shall not be prejudicially affected by notice of any

(*b*) *Cuballero v. Henty*, L. R. 9 Ch. 447; 43 L. J. C. 635; *Reeve v. Berridge*, 20 Q. B. D. 523; 57 L. J. Q. B. 265; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487; 72 L. J. K. B. 873; *Greenhalgh v. Brindley*, [1901] 2 Ch. 324; 70 L. J. C. 740.

(*c*) *Le Nere v. Le Nere*, Amb. 436; 2 Wh. & T. L. C. Eq. 175 and notes. And see *ante*, pp. 111, 351.

(*d*) See *ante*, p. 347.

(*e*) *Tourville v. Naish*, 3 P. Wms. 307; *Jackson v. Rouse*, 4 Russ. 514;

*Allen v. Knight*, 5 Ha. 272; *affd.* 16 L. J. C. 370; *Tildesley v. Lodge*, 3 Sm. & G. 543; *Bailey v. Barnes*, [1894] 1 Ch. 43; 63 L. J. C. 73; *Taylor v. London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477. See *Sharpe v. Foy*, L. R. 4 Ch. 35.

(*f*) *Life Int. and Rev. Securities Corp. v. Hand in Hand Fire and Life Insce.*, [1898] 2 Ch. 230; 67 L. J. C. 548. See *Re Cbe and Nere's Cont.*, [1891] 2 Ch. 109; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487; 72 L. J. K. B. 873.

instrument, fact, or thing unless—(i.) it is within his own knowledge, or would have come to his knowledge, if such inquiries and inspections had been made as ought reasonably to have been made by him, or (ii.) in the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent. (2) This section shall not exempt any purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner, and to the same extent, as if this section had not been enacted. (3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been affected if this section had not been enacted.” And by sect. 2 of the Conveyancing Act, 1881, the word “purchaser” includes “a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property”; and the word “property” itself includes “real . . . property, and any estate or interest in any property, real or personal.” It is generally recognised that sect. 3 of the Conveyancing Act, 1882, effects several important modifications in the law, and the cases decided prior to the statute must be read with caution (*g*).

The duty of a purchaser to investigate the title and verify it with the title deeds has been before adverted to, and the vendor must in all cases perform this duty, although he may not be entitled to have the documents of title handed over to him on completion (*h*). The minimum period for which a title must be shown is forty years, and if the purchaser fails to insist upon this legal right or precludes himself by contract from insisting upon it, he is fixed with notice of all those matters which would

Notice of  
deeds and  
their contents.

(*g*) See *Re Cousins*, 31 Ch. D. 671; 55 L. J. C. 662; *Bailey v. Burnes*, 63 L. J. C. 73; [1894] 1 Ch. 25; *Re White and Smith's Cont.*, [1896] 1 Ch. 637; 65 L. J. C. 481; *Re Valletort Sanitary Steam Laundry*, [1903] 2 Ch. 654; 72 L. J. C. 674. For the older law, see *per* Wigram, V.-C., *Jones v. Smith*, 1 Hare, 43; 11 L. J. C. 83; *affd.* 1 Ph. 244; 12

L. J. C. 331; *et per eundem*, *West v. Reid*, 2 Ha. 249; 12 L. J. C. 245.

(*h*) *Oliver v. Hinton*, [1899] 2 Ch. 264; 68 L. J. C. 583; *Berwick & Co. v. Price*, [1905] 1 Ch. 632; 74 L. J. C. 249. This rule is modified where there is a Registry of deeds, *Agra Bk. v. Barry*, L. R. 7 H. L. 135.

have appeared if a proper investigation of title had taken place (i).

Trusting to representations as to deeds.

But if he make a proper inquiry, and a reasonable account be given respecting the deeds, which he honestly relies upon, he is affected only with such notice as he in fact obtains (k). And accordingly where a party has notice of a deed which does not necessarily—which may or may not—affect the property, and is told that it does not affect it but relates to some other property, and the party believes the representation to be true, he is not fixed with notice of the contents of the instrument (l). And where the managing director of a company deposited title deeds relating to land over which the company had created a floating security by way of debentures, the mortgagee by deposit was held to have priority over the debenture holders, notwithstanding at the time when his security was created, he was also depositree of debentures to secure another mortgage debt created by a third party (m).

Notice that deeds are in hands of third party.

Notice of title deeds being at the bankers' of the owner, without any inquiry being made thereupon, was held to operate as constructive notice of a charge the bankers had upon them for advances (n).—But notice of the deeds being in the custody of the solicitor of the owner was held to be no notice of a charge by the solicitor, (beyond his ordinary professional lien,) because it is an ordinary course for a solicitor to have the custody of his client's deeds (o).

Deeds suppressed by fraud or accident.

A purchaser may rely on deeds necessary to support his legal title, of which he had no notice, actual or constructive, at the time of acquiring it, without being affected with the trusts or equities shown in the deeds; as where such deeds have been suppressed by accident or design at the time of the purchase, and an apparently good title shown without them.—Thus, a mortgagor having borrowed trust money by a mortgage deed expressly noticing the trust, took a re-conveyance without paying off the *cestui que trust*, and afterwards by suppressing the mortgage and re-conveyance showed a good title to a purchaser and sold and conveyed to him the estate; it was held that

(i) *Re Cox and Nere's Cont.*, [1891] 2 Ch. 109; *Re Nisbet and Poff's Cont.*, [1906] 1 Ch. 386; 75 L. J. C. 145. See *Patman v. Harland*, 17 Ch. D. 353; 50 L. J. C. 642.

(k) *Jones v. Smith*, 1 Hare, 43; 11 L. J. C. 83; affd. 1 Phill. 244; 12 L. J. C. 381; *Hewitt v. Loosenmore*, 9 Hare, 449; 21 L. J. C. 69; *Espin v. Pemberton*, 3 De G. & J. 554; 28 L. J. C. 311; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652; 40 L. J. C. 777; *Dixon v.*

*Muckleston*, L. R. 8 Ch. 161; 42 L. J. C. 210.

(l) *Jones v. Smith*, 1 Ha. 43; 11 L. J. C. 83; affd. 1 Ph. 244; 12 L. J. C. 381.

(m) *Re Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654; 72 L. J. C. 674.

(n) *Maxfield v. Burton*, L. R. 17 Eq. 15; 43 L. J. C. 46.

(o) *Bezon v. Williams*, 3 Y. & J. 150.

the purchaser was entitled to retain the legal estate against the *cestui que trust*, notwithstanding the mortgage and re-conveyance were necessary steps in his title (*p*).

An informality or defect in a deed, as the absence of the usual receipt for the purchase money, or the receipt appearing in an unusual form or place, was thought sufficient in one case to put a party upon inquiry, and to fix him with notice of the title of a third party (*q*), but the tendency of more recent decisions has been to restrict rather than enlarge the cases in which a party has been fixed with constructive notice (*r*). A person is affected with notice of all circumstances apparent upon the deeds which a solicitor, if employed by him, would have discovered on his behalf; he cannot avoid such notice by not having used the ordinary caution of employing a solicitor to protect his interest (*s*).

Informality  
or defect in  
deed.

Where a person other than the vendor is in possession of land, the purchaser is bound to inquire of the occupant what his rights may be; but where the land is vacant, he is not bound to make a similar inquiry of the former occupant; and according as the duty to inquire does or does not exist, so are the rights of third parties available against the purchaser (*t*). So where the tenants in possession paid their rents to an estate agent who received it on behalf of the freeholder, a mortgagee was not fixed with constructive notice of the freeholder's title to impeach a conveyance of the land (*u*). But the purchaser has no notice of those matters which a tenant would have suppressed (*x*).

Constructive  
notice im-  
puted from  
the possession  
of the land.

This constructive notice extends to any contract or equity of the tenant in possession affecting the title, which the tenant would be presumed to communicate to an intending purchaser in answer to inquiries; as a covenant or agreement to renew his lease, or a contract to sell to the tenant (*y*).—So with terms of the tenancy concerning valuations to an outgoing tenant (*z*).—And where land was occupied under an agreement that it should be partnership property, and one of the partners subsequently

Rights of  
occupants.

(*p*) *Pitcher v. Rawlins*, L. R. 7 Ch. 259; 41 L. J. C. 485.

(*q*) *Kennedy v. Green*, 3 M. & K. 699. As to the effect of signing a receipt for the purchase money, see *ante*, p. 349.

(*r*) *Hunter v. Walters*, L. R. 7 Ch. 75; *Curritt v. Real and Personal Advece. Co.*, 42 Ch. D. 263; 58 L. J. C. 688.

(*s*) *Kennedy v. Green*, 3 M. & K. 699; *Oliver v. Hinton*, [1899] 2 Ch. 264; 68 L. J. C. 583.

(*t*) *Daniels v. Darison*, 16 Ves. 249; 17 Ves. 433; *Allen v. Anthony*, 1 Mer.

282; *Miles v. Langley*, 1 Russ. & M. 39; 2 Russ. & M. 626; *Bailey v. Richardson*, 9 Ha. 734; *Trinidad Asphalt Co. v. Coryal*, [1896] A. C. 587; 65 L. J. P. C. 100.

(*u*) *Hunt v. Luck*, [1902] 1 Ch. 428; 71 L. J. C. 239.

(*x*) *Carter v. Williams*, L. R. 9 Eq. 678; 39 L. J. C. 560.

(*y*) *Daniels v. Darison*, 16 Ves. 249; 17 Ves. 433.

(*z*) *Phillips v. Miller*, 43 L. J. C. P. 74; L. R. 9 C. P. 196.

mortgaged his estate in the land to a person who had notice that it was occupied by the firm for partnership purposes; creditors of the partnership were given priority over the mortgagee, even in respect of debts incurred subsequently to the mortgage (*a*).

But if the tenant has in fact no right enforceable in the courts, it is immaterial that the conveyance to the purchaser is expressed to be subject to his alleged rights (*b*).

Notice to  
solicitor or  
agent.

Fraud.

A principal is fixed with notice of facts coming to the knowledge or notice of his agent, whether counsel or solicitor; this has sometimes been called constructive notice, but it is more correct to regard the agent as the *alter ego* of the principal who is fixed with actual or constructive notice according as his agent has actual or constructive notice (*c*). Where there is fraud which the agent of the party would conceal, the principal will not be fixed with notice (*d*); so, too, where the agent expressed his intention of suppressing the information which he acquired notice was excluded (*e*). By sect. 3 of the Conveyancing Act, 1882, to bind the principal, the notice must be obtained by the agent in a transaction in which the question of notice arises. This restores the older law and overrides the cases which had extended the doctrine, so as to bind the principal where his agent had been previously employed in a transaction concerning the same property (*f*).

Solicitor acting for several parties.

Where the solicitor for a purchaser or mortgagee was also the solicitor of the vendor or mortgagor in the matter of the purchase or mortgage, there would formerly have been imputed to the purchaser or mortgagee notice of all those matters which the solicitor acquired as solicitor for the vendor or mortgagor, including notice of prior dealings with the property by the vendor or mortgagor through the same solicitor. But this rule has been modified by sect. 3 of the Conveyancing Act, 1882 (*g*).

Where the mortgagor is himself a solicitor and prepares the

(*a*) *Chrander v. Bulteel*, L. R. 9 Ch. 79; 43 L. J. C. 370.

(*b*) *Luffkin v. Nunn*, 13 Ves. 170; *Smith v. Widdlake*, 3 C. P. D. 10; 47 L. J. C. P. 282. See *Frazer v. Jones*, 5 Hare, 475; affd. 17 L. J. C. 353.

(*c*) *Espin v. Pemberton*, 3 De G. & J. 544; 28 L. J. C. 311; *Bradley v. Riches*, 9 Ch. D. 189; 47 L. J. C. 811; *Berwick & Co. v. Price*, [1905] 1 Ch. 632; 74 L. J. C. 249.

(*d*) *Kennedy v. Green*, 3 M. & K. 699; *Atterbury v. Wallis*, 8 De G. M. & G. 454; 25 L. J. C. 792; *Rolland v. Hart*, L. R. 6 Ch. 678; 30 L. J. C. 345; *Cure*

*v. Care*, 15 Ch. D. 639; 49 L. J. C. 505. See *Bateman v. Hunt*, [1904] 2 Ch. 530; 73 L. J. K. B. 782.

(*e*) *Sharpe v. Foy*, L. R. 4 Ch. 35. See *Hooper v. Cooke*, 25 L. J. C. 467.

(*f*) *Lawther v. Carleton*, Cas. t. Talb. 186; *Worsley v. Scarborough (Earl)*, 3 Atk. 292; *Le Cousins*, 31 Ch. D. 671; 55 L. J. C. 662. See *Thorne v. Heurd*, [1895] A. C. 495; 64 L. J. C. 652.

(*g*) *Hargreaves v. Rothwell*, 1 Keen, 154; *Fuller v. Bennett*, 2 Hare, 394; 12 L. J. C. 355; *Rolland v. Hart*, L. R. 6 Ch. 678; 40 L. J. C. 345. See *ante*, p. 356.



mortgage deed, though the mortgagee employ no other solicitor, the relation does not necessarily arise so as to fix the mortgagee with constructive notice; but some consent must be proved on the part of the mortgagee that the mortgagor should act as his solicitor (*h*).

Mortgagor himself solicitor.

A *lis pendens* or suit relating to land (including leaseholds) affects a purchaser *pendente lite*, and his title is, in general, subject to the result of the litigation,—in accordance with the maxim, *pendente lite nihil innovetur* (*i*). The doctrine of *lis pendens* does not apply to personal property, except leaseholds and perhaps money in court (*k*).

*Lis pendens*.

The effect of a *lis pendens* upon a purchaser extends only to the rights in question in the suit, which require to be ascertained; it does not apply to other rights, though apparent upon the proceedings in the suit; as the equity of a defendant against a co-defendant which is not required to be adjudicated upon for the purposes of the suit (*l*).

Extends to rights in question in suit.

A *lis pendens* and its consequent operating effect upon a purchaser *pendente lite* ceases upon judgment or decree, although the judgment remain to be carried into execution (*m*).

Effect ceases upon judgment or decree.

The Judgments Act, 1839, s. 7, has enacted that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until it has been registered (*n*). The registration of a suit or other process as a *lis pendens* may be vacated under the provisions of sect. 2 of the *Lis Pendens* Act, 1867.

Registration of *lis pendens*.

Debts to the Crown by record and specialty and from accountants to the Crown are made a charge upon the real estate, legal and equitable, of the debtors by various statutes; and they take priority over a purchaser without notice; but they must be registered according to statute, otherwise a purchaser even with notice cannot be charged with them (*o*).

Crown debts.

It is beyond the scope of the present work to refer in detail to the various statutes which created a charge for the judgment

Judgments.

(*h*) *Espin v. Pemberton*, 4 Drew. 333; 3 De G. & J. 554; 28 L. J. C. 311.

(*i*) *Winchester (Bp.) v. Payne*, 11 Ves. 194; *Bellamy v. Sabine*, 1 De G. & J. 566; 26 L. J. C. 797. See *Wyatt v. Barwell*, 19 Ves. 435; *Hadley v. London Bk. of Scotland*, 3 De G. J. & S. 63; *London and County Bk. v. Lewis*, 21 Ch. D. 490.

(*k*) *Wigram v. Buckley*, [1894] 3 Ch. 483; 63 L. J. C. 689.

(*l*) *Bellamy v. Sabine*, 1 De G. & J.

566; 26 L. J. C. 797; *Tyler v. Thomas*, 25 Beav. 47; *Bull v. Hutchens*, 32 Beav. 615. See *Schofield v. Solomon*, 54 L. J. C. 1101.

(*m*) *Worsley v. Scarborough (Earl)*, 3 Atk. 392; *Kinsman v. Kinsman*, 1 Russ. & M. 617. See *Berry v. Gibbons*, L. R. 8 Ch. 747; 42 L. J. C. 89.

(*n*) *Ex p. Thornton*, L. R. 2 Ch. 171; 36 L. J. C. 190.

(*o*) Land Charges Act, 1900, s. 2; Carson, Real Prop. Stats. p. 511.

debt upon the judgment debtor's land in favour of his judgment creditor. Every writ or order affecting land (which expression includes incorporeal hereditaments) and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, is void against a purchaser for value of the land, unless the writ or order is for the time being registered in pursuance of the Act; with a saving of the rights of a person who has registered his action as a *lis pendens* (p).

Judgment operates only upon the beneficial interest.

An execution creditor—and the Crown has no higher prerogative right—can only take in execution the beneficial interest of the debtor, and is subject to all prior equitable charges and interests created by him; nor can the judgment creditor claim any protection or priority against prior claims by reason of acquiring the legal estate by execution or otherwise (q).

Registration in Middlesex.

By the Middlesex Registry Act, a deed or conveyance is to be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless registered according to the Act before the registering of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim (r).

Equitable charges created by mere agreement are within the Acts and require to be registered; as an agreement to execute a mortgage, or to make a deposit of title deeds (s).—So, a further charge upon a registered mortgage must be registered, or it will lose priority over a subsequent registered charge (t).

Notice prevails notwithstanding registration.

The equitable doctrine of notice prevails notwithstanding these Acts; and a purchaser with notice of a prior claim is charged with it in equity notwithstanding he has obtained priority of registration (u).—A purchaser without notice may after notice obtain priority by prior registration (x).

Effect of registration as notice.

Registration under these Acts is not alone notice; a purchaser is not bound to search the register, and negligence is not imputed

(p) Lands Charges Registration and Searches Act, 1888, ss. 5, 6; Carson, Real Prop. Stats. 503 *et seq.*

(q) *Re v. Saunderson*, Wightw. 50; *Re v. Topping*, McCl. & Y. 544; *Casperd v. Att-Gen.*, 6 Price, 411; *Whitworth v. Gauguin*, 1 Phil. 728; 13 L. J. C. 288; *Beavan v. Oxford (Earl)*, 6 D. M. & G. 507; 25 L. J. C. 299; *Eyre v. McDonnell*, 9 H. L. Cas. 619; *Indley v. Consolidated Bk.*, 38 Ch. D. 238; 57 L. J. C. 468. As to the effect of a judgment upon powers, see *ante*, p. 277.

(r) 7 Anne, c. 20. As to the Registry of the Bedford Level see 15 Ch. II. c. 17; it applies only for the purposes of the Act: *Willis v. Brown*, 10 Sim. 127; 8 L. J. C. 321.

(s) *Nere v. Pennell*, 2 H. & M. 170; 33 L. J. C. 19; *Re Wright's Mortgage Trust*, L. R. 16 Eq. 41; 43 L. J. C. 66.

(t) *Credland v. Potter*, L. R. 10 Ch. 8; 44 L. J. C. 169.

(u) *Le Nere v. Le Nere*, Ambl. 436; 3 Atk. 646; 2 Wh. & T. L. C. Eq. 175.

(x) *Elsey v. Lutjens*, 8 Hare, 159.

for omitting to search; and if he do search, he will only be presumed to be acquainted with the contents of the register during the period for which he searched (*y*).

These principles applied to lands in Yorkshire, until the passing of the Yorkshire Registries Act, 1884, which makes the registration of an instrument actual notice of the instrument, and of the fact of registration, and fixes priority according to the date of registration in spite of actual or constructive notice of an unregistered document, with a slight modification in the case of wills (*z*).

Registration  
in Yorkshire.

The Transfer of Land Acts, 1862, 1875, and 1897, established registries of title to land and made provision that a purchaser should not be affected by unregistered dealings or equities (*a*). Where these statutes are in force in Middlesex or Yorkshire, the foregoing statutory provisions regarding the registration of deeds are superseded (*b*).

Registry of  
title.

In the case of any fraudulent statement or representation or concealment in obtaining registration the Transfer of Land Act, 1862, provides that "The act or thing done or obtained by means of such fraud or falsehood shall be null and void to all intents and purposes, except as against a purchaser for valuable consideration without notice" (sect. 105). In the case of land registered under the Transfer of Land Acts, 1875 and 1897, provision is made for the compensation of parties defrauded (*c*).

Effect of  
fraud in  
obtaining  
registration.

(*y*) *Morecock v. Dickens*, Ambl. 678; *Hodgson v. Dean*, 2 Sim. & S. 221; *Ford v. White*, 16 Beav. 120; *Re Russel Road Purchase*, L. R. 12 Eq. 78; 40 L. J. C. 673.

(*z*) See *Jones v. Barker*, [1909] 1 Ch. 321; 78 L. J. C. 167.

(*a*) 25 & 26 Vict. c. 53, s. 74; 38 & 39 Vict. c. 87, s. 83, as amended by 60 & 61 Vict. c. 65, Sched. I.; 38 & 39 Vict. c. 87, s. 126.

(*b*) 25 & 26 Vict. c. 53, s. 104; 38 & 39 Vict. c. 65, s. 127.

(*c*) 60 & 61 Vict. c. 65, s. 7.

## § 5. TACKING AND CONSOLIDATING MORTGAGES : MARSHALLING.

The doctrine of tacking.

Right of mortgagee to tack a further charge against mesne incumbrancers—  
—not allowed after notice—tacking against surety—further charge  
must be proved by writing.

Right of assignee of mortgage to tack a further charge—assignment after  
notice—pending suit—notice to first mortgagee.

Mortgage after satisfaction gives no priority—assignee of mortgage in  
same position as mortgagee.

Mortgagor can give no priority amongst equitable charges by subsequent  
transfer of legal estate—where legal estate outstanding charges rank  
in priority of time.

Statute against clandestine mortgages—fraudulent concealment of  
incumbrance.

Debts not charged cannot be tacked against mortgagor—may be tacked  
against heir or devisee—not against creditors—tacking judgment  
debts.

Consolidation of mortgages—by assignee of mortgage—against purchaser  
or mortgagee of equity of redemption.

The doctrine of marshalling—marshalling securities in favour of second  
mortgagee—marshalling assets in favour of creditors—in favour of  
legatees.

Some equitable doctrines regulating the priority of estates and  
interests in land remain to be noticed in this sub-section, namely,  
the doctrines of tacking and consolidating mortgages, and the  
doctrine of marshalling.

Doctrine of  
tacking  
founded on  
the protection  
of the legal  
estate.

Upon the principle of equity, that a purchaser for value with-  
out notice acquiring the legal estate could not be deprived of it  
at the suit of a prior claimant merely upon the ground of priority  
in time of acquisition, was founded the doctrine of tacking  
mortgages and charges (*a*).

Right of mort-  
gagee of legal  
estate to tack  
further  
advance.

By the doctrine of tacking a mortgagee of the legal estate  
making a further advance or acquiring a further charge upon the  
same security, without notice of any intermediate charge, is  
entitled to tack or add the further advance or charge to his  
original debt, and to hold the legal estate as against intermediate  
incumbrancers until he be satisfied in full (*b*).

(*a*) 2 Coote, *Mortgages*, 1240. See *Powell v. Brodhurst*, [1901] 2 Ch. 160; 70 L. J. C. 587. The right was temporarily in abeyance, see *ante*, p. 351.

(*b*) *Brace v. Marlborough (Duchess)*, 2 P. Wms. 491, 494; *Baker v. Harris*, 11 Ves. 397; *Wyllie v. Pollen*, 3 De G. J. & S. 596; 32 L. J. C. 782. See *Lloyd v. Attwood*, 3 De G. & J. 614; 29 L. J. C. 97. "A party claiming to tack must, as against the party against whom the

tack is to operate, have advanced his money upon the credit of the land; 2dly, He must, except as to time have an equal equity; and 3dly, which follows from the last, he must have advanced his money without notice of the other's claim." *Per* Cottenham, L. C., in *Lucey v. Ingle*, 2 Ph. 413. And see the doctrine explained in *Liverpool Marine Credit Co. v. Wilson*, L. R. 7 Ch. 507; 41 L. J. C. 798.

But the legal mortgagee is not entitled to tack further advances as against an intermediate mortgage or charge of which he had notice at the time of making the advances. Nor does he become entitled to do so by reason of his mortgage deed being expressly made to extend to further advances; and although the subsequent mortgagee had notice that it so extended (*c*). Where the subsequent mortgage was expressly made "subject to the security already given," which extended to further advances, it was held that further advances with notice could not be tacked against it (*d*).

Tacking not allowed after notice—though mortgage extend to further advances.

A mortgagee cannot, in general, tack a further charge as against a surety for the mortgagor; for a surety is entitled to the benefit of all the securities unimpaired, in the event of being compelled to pay the debt, and cannot be prejudiced by any subsequent transaction between the creditor and the principal debtor (*e*).

Right to tack as against surety for mortgage debt.

Further advances made upon the security of a prior legal mortgage cannot be charged by a mere verbal agreement without the evidence in writing required to satisfy the Statute of Frauds (*f*).

Further charge must be proved by writing.

In extension of the same doctrine, a third mortgagee who has advanced his money upon the same security without notice of a second mortgage or charge, upon subsequently taking an assignment of the original legal mortgage may, tack as against the second mortgagee, where he took the assignment of the first mortgage after notice of the intermediate charge; provided he was not affected with notice at the time of taking his own mortgage (*g*).—The third mortgagee, may buy in the first legal mortgage pending a suit by the second incumbrancer to realise his security, for the *lis pendens* has no further effect than notice; but he cannot do so after a decree made, for there is then a judgment for the creditors that they shall be paid according to their priorities (*h*).

Right of assignee of mortgage to tack.

It is immaterial to the right of the third mortgagee that the first mortgagee have notice of the intermediate charge at the time

Notice to first mortgagee is immaterial.

(*c*) *Shaw v. Neale*, 6 H. L. C. 581; 27 L. J. C. 444; *Hopkinson v. Rolt*, 9 H. L. C. 514; 34 L. J. C. 468; *West v. Williams*, [1899] 1 Ch. 132; 68 L. J. C. 127.

(*d*) *Menzies v. Lightfoot*, L. R. 11 Eq. 459; 40 L. J. C. 561. But it was there said that the second mortgage might by sufficiently explicit terms be made subject to further advances to be made on the first mortgage.

(*e*) *Forbes v. Jackson*, 19 Ch. D. 615; 51 L. J. C. 690. See *Nicholas v. Ridley*, [1904] 1 Ch. 192; 73 L. J. C. 145.

(*f*) *Ex p. Hooper*, 19 Ves. 477; 1 Mer. 7.

(*g*) *Marsh v. Lee*, 2 Vent. 337; 1 Ch. Ca. 162; 2 Wh. & T. L. C. Eq. 107.

(*h*) *Marsh v. Lee*, 2 Vent. 337; 1 Ch. Ca. 162; 2 Wh. & T. L. C. Eq. 107; *Bristol (Earl) v. Hungerford*, 2 Vern. 524. See *Ex p. Knott*, 11 Ves. 609.

of transferring his mortgage. For he holds the legal estate in his own right, as security for the debt, and may, therefore, transfer it to whom he pleases, subject only to the equity of redemption; nor can his rights be restrained by a mere notice of other claims; and there is no equity to redeem the property in the hands of the transferee, without paying off all the advances he may have made upon the security of it without notice of prior claims (*i*).

Satisfied mortgage gives no priority.

But a legal mortgagee, after satisfaction of the debt, can neither tack any subsequent debt of his own, nor can he give any advantage to a subsequent incumbrancer by a transfer of the legal estate; for he has then ceased to hold in his own right and is a bare trustee for the mortgagor and those claiming under him, and the transferee would be affected with the same trust (*k*).—And in general, the assignee of a mortgage debt and security, unless by the concurrence of the mortgagor, is in no better position than the assignor; and if the debt be invalid or subject to equities on the part of the mortgagor, the assignee acquires no greater charge upon the land in respect of it, or of the consideration paid for it (*l*).

Mortgagor can give no priority amongst charges by transfer of legal estate. Where legal estate outstanding priority is in order of time.

Upon a like principle, a mortgagor, having created several successive equitable mortgages or charges, cannot give an advantage to one of them by a subsequent transfer of the legal estate, as he is trustee for all according to their priorities (*m*).—And generally, in all cases where the legal estate is outstanding, as where it remains in a first mortgagee, the several incumbrances, in the absence of special circumstances affecting their relative equities, rank according to their priority in time (*n*).

Statute against clandestine mortgages.

The statute against clandestine mortgages (4 & 5 W. & M. c. 16) provides that a mortgagor granting a second mortgage, without

(*i*) *Peacock v. Burt*, 4 L. J. C. 73; *Bates v. Johnson*, Johns. 304; 28 L. J. C. 509; *West London Comm. Bk. v. Reliance Perm. Buildg. Soc.*, 29 Ch. D. 954; 54 L. J. C. 1081; *Taylor v. Russell*, [1892] A. C. 244; 61 L. J. C. 657.

(*k*) *Brecon (Corp.) v. Seymour*, 26 Beav. 548; 28 L. J. C. 606; *Harpham v. Shacklock*, 19 Ch. D. 207. See *ante*, pp. 216, 352.

(*l*) *Burt v. Trueman*, 29 L. J. C. 902; *Ogilvie v. Jeaffreson*, 2 Giff. 353.

(*m*) *Sharplex v. Adams*, 32 Beav. 213; *Mumford v. Stohwasser*, L. R. 18 Eq. 556; 43 L. J. C. 694. But in a case

where, under such circumstances, the legal estate was conveyed by the mortgagor in pursuance of a contract with the first incumbrancer to that effect, it was held to give the right to tack subsequent advances against mesne incumbrances, as if originally conveyed. *Cooke v. Wilton*, 29 Beav. 100; 30 L. J. C. 467; and see *ante*, p. 352.

(*n*) *Erere v. Moore*, 8 Price, 475; *Wilmot v. Pike*, 5 Ha. 14; *London and County Bk. v. Goddard*, [1897] 1 Ch. 642; 66 L. J. C. 261; *Taylor v. London and County Bk.*, [1901] 2 Ch. 231; 70 L. J. C. 477.

giving the second mortgagee notice in writing of the first mortgage, shall forfeit his equity of redemption, and the second mortgagee shall hold the lands as if he had been the absolute purchaser; but the title of the second mortgagee under this statute is very doubtful and precarious, so that it is safer and more usual to resort to his power of sale (*o*).—By the 22 & 23 Vict. c. 35, s. 24, as amended by s. 8 of the Law of Property Act, 1860, the fraudulent concealment of any instrument or incumbrance by a seller or mortgagor, or his solicitor or agent, is made a misdemeanour, punishable by fine or imprisonment (*p*).

Fraudulent concealment of incumbrance.

A mortgagee cannot tack debts, which are not charged upon the estate, even against the mortgagor; and the mortgage may be redeemed upon payment of the mortgage debt only, notwithstanding the mortgagee be a creditor in respect of other debts not charged upon the same security (*q*).

Debts not charged cannot be tacked against mortgagor.

Upon the death of the mortgagor the mortgagee can tack against the heir or devisee all such debts as in the administration of assets become charged upon the real estate; which formerly was the case only with specialty debts binding the heir, but since the statute 3 & 4 Will. IV. c. 104, is the case with all debts, as well debts due on simple contract as on specialty, either under a charge of debts by will, or under the statute; and the heir or devisee cannot redeem without paying all such debts (*r*).—So upon the mortgage of a term of years or other personal estate, the executor cannot redeem without paying all debts to the mortgagee (*s*).

May be tacked against heir or devisee.

But he cannot tack debts not specifically charged upon the estate against other creditors; who, having a like charge upon the real assets of the deceased mortgagor, are entitled to be paid rateably (*t*). And where the equity of redemption is assigned for value the right to tack ceases from the date of the assignment (*u*).

Not against creditors.

A first mortgagee might formerly tack a further sum advanced upon a judgment, as against a mesne mortgagee of whose charge he had no notice, because the judgment operated as a charge

Tacking judgment debts.

(*o*) See observations on this Statute in *Kennard v. Futroge*, 2 Giff. 81; 29 L. J. C. 553.

(*p*) *Smith v. Robinson*, 13 Ch. D. 148; 49 L. J. C. 20.

(*q*) *Archer v. Snatt*, 2 Strange, 1107; *Morret v. Pashe*, 2 Atk. 53; *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Jones v. Smith*, 2 Ves. jun. 372. See *Re Bowes*, 33 Ch. D. 586; 56 L. J. C. 143.

(*r*) *Coleman v. Winch*, 1 P. Wms.

775; *Rolfe v. Chester*, 20 Beav. 610; 25 L. J. C. 244; *Thomas v. Thomas*, 22 Beav. 341; 25 L. J. C. 391.

(*s*) See *Coleman v. Winch*, 1 P. Wms. 775.

(*t*) *Rolfe v. Chester*, 20 Beav. 610; 25 L. J. C. 244; *Talbot v. Frere*, 9 Ch. D. 568; *Heams v. Bance*, 3 Atk. 630.

(*u*) *Coleman v. Winch*, 1 P. Wms. 775; *Adams v. Claxton*, 6 Ves. 226.

upon the land upon the credit of which the mortgagee was presumed to have advanced the money; but a judgment is no longer any charge upon the land as against a purchaser or mortgagee until the writ or order affecting the land is registered (*x*).—A judgment creditor, by buying in the first mortgage, could not tack or unite the two debts, because the judgment creditor acquired no specific charge upon the land, but only a general charge upon all the real estate which could be taken in execution; besides, it was said, the judgment creditor does not lend his money upon the credit of the land, and is not deceived by prior judgments or incumbrances (*y*).

Consolidation  
of mortgages.

A mortgagee who had advanced moneys to the same mortgagor at different times upon the security of several properties was entitled formerly as of right to consolidate his mortgages, that is, to treat the total of the amounts advanced as one debt, and the properties in mortgage as one security. Where the mortgage is made after the 31st December, 1881, the right can only be reserved by contract “in the mortgage deeds or one of them” (*z*). The mortgagee may assert the right, where it exists, not only in a suit for redemption, but also in a suit for foreclosure, or upon a sale under a power (*a*).

Equitable  
mortgages.

The same right is incident to equitable mortgages where the right to consolidate is reserved by deed (*b*).

Assignee of  
mortgage may  
consolidate.

Where two or more mortgages which were originally made to several persons or sets of persons, are transferred to one person, the transferee is entitled to consolidate the mortgages against the mortgagor or the person to whom the equity of redemption in the entire property has been assigned (*c*).

Surety for one  
of two mort-  
gages.

A mortgagee may consolidate as against a surety for one of two mortgage debts to the same mortgagee (*d*).

The right to consolidate mortgages exists so long as the property

(*x*) See *ante*, p. 362.

(*y*) *Brace v. Marlborough (Duchess)*, 2 P. Wms. 491; see *per* Cottenham, L. C., in *Lacey v. Ingle*, 2 Ph. 421.

(*z*) Conveyancing and Law of Property Act, 1881, s. 17; *Wren v. Bird*, 33 Ch. D. 215; 55 L. J. C. 722; *Farmer v. Pitt*, [1902] 1 Ch. 954; 71 L. J. C. 500; *Re Salmon, Ex p. Trustee*, [1903] 1 K. B. 147; 72 L. J. K. B. 125; *Hughes v. Britannia Permanent Bg. Soc.*, [1906] 2 Ch. 607; 75 L. J. C. 739; *Sharp v. Richards*, [1909] 1 Ch. 109; 78 L. J. C. 29. See *Griffith v. Pound*, 45 Ch. D. 553.

(*a*) *Watts v. Symes*, 1 De G. M. & G. 240; 21 L. J. C. 713; *Selby v. Pomfret*,

3 De G. F. & J. 595. See *Cummins v. Fletcher*, 14 Ch. D. 699; 49 L. J. C. 563.

(*b*) *Nerr v. Pennell*, 2 H. & M. 170; 33 L. J. C. 19; Conveyancing and Law of Property Act, 1881, s. 17.

(*c*) *Vint v. Padgett*, 2 De G. & J. 611; 28 L. J. C. 21; *Tweeddale v. Tweeddale*, 23 Beav. 341; *Pledge v. White*, [1896] A. C. 187; 65 L. J. C. 449. See *Cracknell v. Janson*, 11 Ch. D. 1.

(*d*) *Furbrother v. Wodehouse*, 23 Beav. 18; 26 L. J. C. 81. See *Nicholas v. Riley*, [1904] 1 Ch. 192; 73 L. J. C. 145.



remains in one hand, whether it be the mortgagor or his transferee, and having once existed is available against a person to whom an interest in the equity of redemption of part of the property is subsequently transferred (*e*); but where the equity of redemption in one property is assigned or mortgaged to a third person, there is no subsequent right of consolidation upon the acquisition of the prior mortgages by one person (*f*).

As against purchaser or mortgagee of equity of redemption.

Where a prior claimant has the security of two or more funds or estates, and a subsequent claimant has the security of one or some only of the same funds or estates, the court will arrange the funds or estates to meet the various claims upon them in such order as, if possible, to satisfy all the claims. This is known as marshalling (*g*).

The doctrine of marshalling.

The right of the claimant to invoke the doctrine of marshalling depends upon the sufficiency of the security to satisfy the claim of the prior creditor; so far as the prior creditor is unable to obtain satisfaction from the security to which he is exclusively entitled, he is entitled to priority of payment from the security in which both are interested (*h*). And if a prior incumbrancer, in exercise of his *primâ facie* right enforces his security against that part to which another claimant is also entitled the latter will be entitled to stand in the shoes of the prior creditor as against the remaining part of the property covered by the prior incumbrance to the extent to which he has been disappointed by this election (*i*). But the doctrine will not be applied so as to work injustice between the incumbrancers; thus if two estates are mortgaged first to A., and the equity of redemption in one estate is mortgaged to B., and the equity of redemption in the other estate to C., here the debt due to A. must be apportioned rateably between the two properties according to their respective values, and B. and C. take the properties respectively charged in their favour subject to this apportioned charge, any surplus that there may be being applied in paying the deficiency arising to B. and C., as the case may be, upon realising their security (*k*).

(*e*) *Vint v. Padgett*, 2 De G. & J. 611; 28 L. J. C. 21. See *Sharp v. Richards*, [1909] 1 Ch. 109; 78 L. J. C. 29.

(*f*) *Baker v. Gray*, 1 Ch. D. 491; 45 L. J. C. 165; *Jennings v. Jordan*, 6 App. Cas. 698; 51 L. J. C. 129; *Harter v. Colman*, 19 Ch. D. 630; 51 L. J. C. 481; *Minter v. Carr*, [1894] 3 Ch. 498; 63 L. J. C. 705; *Pledge v. White*, [1896] A. C. 187; 65 L. J. C. 449.

(*g*) *Aldrich v. Cooper*, 8 Ves. 382; 1 Wh. & T. L. C. Eq. 36. See *Webb v. Smith*, 30 Ch. D. 192; 55 L. J. C. 343.

(*h*) *Hardwicke, L. C., Lanoy v. Athol (Duke)*, 2 Atk. 446; *Tidd v. Lister*, 3 De G. M. & G. 857; 23 L. J. C. 249; *Wallis v. Woodgear*, 2 Jur. N. S. 179.

(*i*) *Trimmer v. Bayne*, 9 Ves. 207; *Cracknall v. Janson*, 11 Ch. D. 1; 48 L. J. C. 168. See *Re Mower's Trusts*, L. R. 8 Eq. 110; *Binn v. Nichols*, L. R. 2 Eq. 256; 35 L. J. C. 635.

(*k*) *Barnes v. Rucster*, 1 Y. & C. C. C. 401; 11 L. J. C. 228; *Moron v. Berkeley Bq. Soc.*, 59 L. J. C. 524; *Flint v. Howard*, [1893] 2 Ch. 54; 62 L. J. C.

Marshalling securities in favour of second mortgagee.

Accordingly, where there is a first mortgagee holding a mortgage over two estates, and a second mortgage or other charge over one of the estates only, the first mortgagee may be compelled to resort first to the estate over which there is no second mortgage, in order to leave as much as possible out of the other to the second mortgagee; and if he has realised out of the one estate to the exclusion of the second mortgagee, the latter may resort, in his place, to the other estate (*l*).

Marshalling assets in favour of creditors.

The same doctrine is applied in the administration of the assets of a deceased person; if a creditor resort to a portion of the assets which is common to other creditors, the latter may stand in his place as against assets to which the former might have resorted but the latter could not. Hence it was, prior to the Administration of Estates Act, 1833, that if creditors by specialty binding the heirs, who might recover satisfaction out of the real estate, resorted to the personal estate to the exclusion of simple contract creditors who had no remedy against the real assets, the simple contract creditors were allowed satisfaction out of the real assets so far as the specialty creditors had exhausted the personalty (*m*).

And where estates which on death devolve in different ways, as is the case with freeholds and leaseholds, are mortgaged so as to secure one debt, the mortgage debt must be apportioned between the freeholds and leaseholds according to their respective values, unless it clearly appears that one property was to be the primary security, and the other the secondary security, to which provision the court will give effect (*n*).

Marshalling assets in favour of legatees.

The doctrine of marshalling assets is also applied in favour of pecuniary legatees as against the real assets descended or charged with debts. If the creditors have exhausted the personal assets, which are the only fund for the legatees, the latter become entitled to charge the real estate to which the creditors might have resorted, to the extent to which the creditors have exhausted the personalty; and the same doctrine is applied as between legatees, some only of whose legacies are charged upon real estate (*o*).

804. See *Re Mower's Trusts*, L. R. 8 Eq. 110.

(*l*) *Aldridge v. Forbes*, 9 L. J. C. 37; *Gibson v. Seagrim*, 20 Beav. 614; 24 L. J. C. 782; *Ford v. Tynte*, 41 L. J. C. 758.

(*m*) *Aldrich v. Cooper*, 8 Ves. 382; 1 Wh. & T. L. C. Eq. 36 and notes. See

*ante*, p. 191.

(*n*) *Re Athill*, 16 Ch. D. 211; 50 L. J. C. 123. See *Re Mower's Trusts*, L. R. 8 Eq. 110.

(*o*) *Clifton v. Burt*, 1 P. Wms. 679 and note; *Lutkins v. Leigh*, Cas. t. Talb. 53; *Re Smith*, [1899] 1 Ch. 36; 68 L. J. C. 333.

But this right is restricted to the real assets left to descend or charged with debts by the testator, and there is no marshalling in favour of pecuniary legatees against devisees of the real estate, nor any right of contribution from the latter towards a deficiency of personal estate (*p*).—A devise to the testator's heir, since the statute 3 & 4 Will. IV. c. 106, s. 3, precludes marshalling against him, as under that statute he is to be considered to have acquired the land as a devisee, and not by descent (*q*).

No marshalling against devisees.

(*p*) *Clifton v. Burt*, 1 P. Wms. 679; (*q*) *Strickland v. Strickland*, 10 Sim. 374; 9 L. J. C. 60. See *ante*, p. 124.  
*Mirehouse v. Scutife*, 2 M. & Cr. 695; *Farquharson v. Floyer*, 3 Ch. D. 109.



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